

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

**St. Joseph News-Press and Teamsters Union Local 460.** Case 17–CA–20534, 17–CA–20649, and 17–CA–21008

August 27, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN  
AND SCHAUMBER

On September 6, 2001, Administrative Law Judge Albert A. Metz issued the attached decision. The General Counsel and the Union filed briefs in support of the judge's decision. The Respondent filed exceptions and a brief in support of those exceptions. The Union filed an answering brief, to which the Respondent filed a reply brief. The Newspaper Association of America with McClatchy Newspapers, Inc., Knight-Ridder, Inc., North Jersey Media Group, The Belo Corp., The Tribune Company, Advance Publications, Inc., E.W. Scripps, Co., and the California Newspaper Publishers Association, the Missouri Press Association, and Graphic Communications International Union, AFL–CIO, CLC, filed amicus briefs. The General Counsel filed limited exceptions and arguments in support thereof.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and affirms the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The threshold issue presented is whether the Respondent's newspaper carriers and haulers are employees under the Act. We find, contrary to the judge, that under the standards of *Roadway Package Systems*, 326 NLRB 842 (1998), and *Dial-A-Mattress Operating Corp.*, 326 NLRB 884 (1998), they are not employees, but are independent contractors excluded from the protection of the Act. Accordingly, we dismiss the numerous allegations of unfair labor practices allegedly committed against the independent contractors.

I. FACTUAL BACKGROUND

The Respondent, Saint Joseph News-Press, publishes early each morning a daily newspaper in Saint Joseph, Missouri. Haulers pick up the bundled papers at the plant and bring them to common drop points, where carriers<sup>1</sup> pick them up. Carriers who deliver in areas near

<sup>1</sup> Because the terms and conditions of employment for haulers and carriers are essentially the same, haulers and carriers are both referred

the Respondent's plant, however, pick up their bundles directly from the plant. The carriers can either queue up to receive their bundles as they come off the press, or pick them up later from the loading area.

Carriers deliver papers to the Respondent's customers. They also place papers in newspaper racks, deliver to dealers, and drop newspapers at the post office to be mailed to subscribers. Some carriers, called single copy carriers, only deliver to racks and dealers.

A. *The Parties' Contract*

When hired, carriers do not complete applications. They sign a contract with the Respondent, expressly describing them as independent contractors. The contract grants the carrier the nonexclusive right to purchase, sell, and deliver the Respondent's newspaper in a designated area and to control the method and means of making deliveries. Carriers sign the contracts as individuals; none are incorporated. Thirty days' notice is required for either party to terminate the contract without cause or for the Respondent to modify the contract. The Respondent can terminate the contract for cause without notice.

The contract, which prohibits carriers from displaying the Respondent's insignia while delivering newspapers, obligates carriers to provide their services 7 days a week. It requires that newspapers must be delivered by 6 a.m. on weekdays and Saturdays and by 6:30 a.m. on Sundays. Carriers must post a bond—the amount of which is individually negotiated—with the Respondent to cover any liability the carriers incur while delivering the newspapers or to cover delivery costs if the Respondent has to take over the route. The contract also requires carriers to carry automobile insurance.

The contract specifies a wholesale price at which the Respondent will sell the newspapers to carriers and a retail price at which the carriers sell the papers to subscribers. Under the contract, the Respondent can change the wholesale price on 30 days' notice, and the retail price is printed on the papers. The contract also provides for a flat weekly amount to be paid carriers, called the rate adjustment credit, which varies from carrier to carrier. Carriers who deliver to racks and dealers negotiate a per piece rate for their delivery services.

B. *The Respondent's Method of Compensation*

Most customers pay the Respondent in advance for their subscriptions (PIA customers), but some customers pay their carriers (carrier-collect customers). Carriers bill those customers, deciding whether and to what extent to extend credit to them. If a PIA customer fails to pay

to as carriers, unless a particular aspect of the haulers' job is being addressed.

the Respondent's bill, the customer is converted to a carrier-collect customer. The carrier has the discretion to either continue delivering the paper to the customer or to terminate the customer's subscription for nonpayment.

Each month, every carrier receives a statement tabulating the amounts he or she owes, and is owed by, the Respondent. The statements show the number of newspapers purchased by the carrier and the amount the carrier owed the Respondent for those papers. It also shows the amount of money the Respondent owes the carrier for newspapers subscribed to by customers who have paid the Respondent in advance. That amount is credited to the carrier, along with the carrier's rate adjustment credit, which is reflected on the statement. If the carrier services a newspaper rack, a \$1 per month charge for rental of the rack is shown. Carriers are also charged for any sales tax they collected from customers they bill directly and for a \$1 per month service charge for processing sales tax. The net credit is remitted to the carrier by check.

The Respondent does not withhold income taxes or pay workers' compensation. In addition, carriers receive no fringe benefits. At the end of the year, the Respondent issues carriers a 1099 form.

#### *C. The Means of Work*

Carriers provide the vehicles they use to service their routes. The Respondent does not specify a particular type or make of vehicle. Instead, Respondent only requires that the vehicle be large enough to carry the number of papers necessary to service the route, that it provide cover for the newspapers in case of rain, and that it be reliable. Carriers maintain their vehicles, and are not reimbursed for any maintenance or operating costs, although they receive a gas subsidy the Respondent initiated to offset higher gas prices. If the carriers are unable to use their own vehicles, they are responsible for finding replacements.

Carriers pay for their own supplies, such as plastic bags and rubber bands, which they can purchase from the Respondent or another vendor.

#### *D. The Extent of the Respondent's Control Over Carriers*

The Respondent communicates with carriers primarily through memos left for them on top of their bundles. Notices of new customers and customer lists are provided to carriers in their bundle tops. The circulation department's district managers are the Respondent's representatives primarily responsible for contact with the carriers. The district managers occasionally call or meet with carriers. The district managers are generally at the plant from 9 a.m. to 5 p.m., while the carriers are usually

at the plant at around 2 a.m. The carriers are not required to return to the plant after completing their routes.

Customer complaints are usually lodged with the Respondent's customer service department and the district managers relay them to the carriers. District managers do not discipline carriers who fail to correct problems complained about by customers, and carriers are not covered by the Respondent's employee handbook or any other extracontractual work rules. If customers consistently complain about a carrier's service, district managers have, on occasion, terminated a carrier's contract.

#### *E. Entrepreneurial Potential*

Although carriers may not subcontract their routes formally, they can, without any notice to the Respondent, hire substitutes to make deliveries for them. The terms and conditions of the substitutes' employment are set by the carrier. The Respondent puts no limits on how often a carrier can use a substitute, and some carriers use full-time substitutes.

If a customer complains that a carrier failed to deliver a newspaper or that the newspaper was damaged upon delivery, the carrier is notified and can choose to redeliver the newspaper or have the Respondent make the redelivery. If the Respondent makes the redelivery, the Respondent charges the carrier for the service. The Respondent employs a few drivers for the purpose of making redeliveries, restocking empty newspaper racks, and delivering newspapers on unassigned routes.

Carriers can solicit new customers on their own. The contract provides for free copies of the newspaper to aid carriers in promoting new subscriptions. The Respondent also runs circulation promotions, in which carriers participate. In addition, the Respondent uses telemarketers to solicit new subscribers. If the Respondent solicits a new subscription from a customer who a carrier previously terminated for nonpayment, the carrier can refuse to deliver to that customer. The carrier can also refuse to service a new subscriber who lives too far from the carrier's route or whose home is inaccessible.

The Respondent determines the routes and can alter them. The Respondent sometimes splits routes that become, in its view, too large. The Respondent does not grant exclusive rights to routes, and some carriers deliver to racks or dealers that are located within another carrier's route. The Respondent also delivers on the routes, if necessary, to replace a missed or damaged paper or to restock a rack that ran out during the day.

Carriers are free to hold other jobs and deliver other products while delivering newspapers on their routes for the Respondent. Nothing in the contract prohibits the carriers from delivering a competing newspaper at the same time they are delivering the Respondent's newspa-

per. At least one carrier also delivers a national newspaper and other carriers deliver other regional newspapers.

Single copy carriers pick up a route sheet and an electronic wand from the Respondent each day. The wand electronically records information relating to each rack serviced by the carrier, including the number of newspapers stocked and the time of delivery. These carriers are required to return the wands to the Respondent at the end of their shifts. The carriers can return proof of unsold papers and receive credit for them. The Respondent determines the dealers and the location of the racks and sets the price at which the newspapers are sold from the racks.

Many carriers have one route; several more than one. One carrier has four routes. Carriers with multiple routes can have one hauling route and one delivery route or several delivery routes.

#### F. Training

New carriers usually learn their routes from their predecessor carriers. If the predecessor carrier is not available, a district manager rides the route with a new carrier. Carriers prepare either a route book or an audio tape that describes how they perform their routes, including directions and customers' preferences for placement of their newspapers, such as a designated tube near the mailbox, on a porch, or on the lawn. Carriers are not required to follow the route books or tapes.

### II. THE ADMINISTRATIVE LAW JUDGE'S DECISION

The complaint alleged that the Respondent violated Section 8(a)(3) and (1) by various actions taken against carriers, including allegations that the Respondent discharged carriers because of their union activities.

The judge found that "the Respondent's integration and control of the carrier and hauler work necessitates the conclusion that these workers are 'employees' within the definition of Section 2(3) of the Act." Applying the criteria set forth in *Roadway Package System, Inc.*, 326 NLRB 842 (1998) (*Roadway*), the judge found the following factors weighed most heavily in favor of finding employee status: (1) the carriers did not operate as independent businesses; (2) they devoted most of their time to performing a function integral to the Respondent's business; (3) the Respondent drafted and modified the contract unilaterally; (4) the Respondent provided some training for the carriers; (5) the Respondent set pick up and delivery times; (6) the carriers did not have an exclusive right to deliver newspapers on their routes; (7) the carriers had little entrepreneurial opportunity for gain or loss; (8) the Respondent did the bookkeeping; and (9) the Respondent had employees who did the same work. Having found that the carriers were employees under the

Act, the judge then found that various personnel actions taken by the Respondent regarding the carriers violated the Act.

### III. POSITIONS OF THE PARTIES

The General Counsel contends that the judge correctly found that the carriers were employees, and that under *Roadway*, supra, and its progeny, such a finding is required. The General Counsel agrees with the judge's finding that the carriers' work is intrinsic to the Respondent's business, that the carriers have no true entrepreneurial opportunities, that the Respondent largely controls the economic relations of the parties, and that the terms of the contracts between the carriers and the Respondent are not determinative of the carriers' status. The General Counsel relies on similar factors in *Corporate Express Delivery Systems*, 332 NLRB 1522 (2000), enf'd. 292 F.3d 777 (D.C. Cir. 2002), in which the Board found that owner-operator delivery drivers were employees where they performed essentially the same functions as the respondent's employees who did the same work, and whose work played an essential role in the respondent's business operations. The General Counsel does not address pre-*Roadway* cases.

The Respondent contends that the judge erred in finding that the carriers are employees. It characterizes the common law test set out in *Roadway* as, ultimately, an assessment of the degree of control that the employer asserts over the hired party. Therefore, the Respondent argues, the pre-*Roadway* right to control test is the same as the *Roadway* common law agency test. It notes that the Board has consistently found that newspaper carriers, haulers, distributors, and hawkers are independent contractors, and argues that this line of cases remains good law and is applicable to the instant case.<sup>2</sup> The Respondent further contends that a finding of independent contractor status is consistent with *Roadway* and *Dial-A-Mattress*, supra.

In addition, the Respondent contends that the judge failed to consider a number of factors supporting a finding of independent contractor status, which were present in other cases in which the Board found newspaper carriers to be independent contractors. Among the factors that the Respondent cites are: (1) the carriers were not subject to discipline by the Respondent; (2) carriers can use their vehicle for other purposes; (3) carriers can use substitutes and determine the substitutes' terms and conditions of employment; (4) carriers have discretion with

<sup>2</sup> See, e.g., *Thomson Newspapers*, 273 NLRB 350, 351-352 (1984); *Drukker Communications, Inc.*, 277 NLRB 418 (1985); *Glens Falls Newspapers, Inc.*, 303 NLRB 614 (1991); *A. S. Abell Publishing Co.*, 270 NLRB 1200 (1984).

respect to extending credit to customers and responding to customers' complaints; (5) carriers can deliver other newspapers while delivering the Respondent's newspapers and can hold other jobs; (6) carriers are not subject to supervision by the Respondent in the field; and (7) carriers can refuse to make a delivery when a customer is too remote.

Amici joining the Respondent in arguing for reversing the judge's findings fault the judge for not addressing pre-*Roadway* newspaper cases. They note that the judge did no more than compare those cases without analysis to the cases on which he relied and state summarily that they were "analyzed on the basis of the right to control test." The amici join the Respondent in contending that that the judge erred in relying on cases involving delivery services rather than businesses like the Respondent's where the delivery personnel deliver only the employer's product.

Amicus GCIU, which joins the General Counsel in arguing for adopting the judge's findings, advocates that, in cases where the outcome under the common law test is close, the Board modify the *Roadway* test by including a determination of whether the Act's purposes would be served by finding independent contractor status. GCIU relies upon the Supreme Court's admonition in *Allied Chemical and Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 168 (1971), that, although common law principles cannot be ignored when assessing employee status, "[i]n doubtful cases, resort must still be had to economic and policy considerations to infuse Section 2(3) with meaning." GCIU argues that in this case, which it characterizes as close, categorizing the carriers as independent contractors and thus placing them outside the purview of the Act would not serve the purposes of the Act. Therefore, it argues, the Board should find that the carriers are employees because the carriers are the kind of workers—individuals who bring little individual economic leverage to the hiring relationship—that the Act was designed to protect.

For the following reasons, we find merit in the Respondent's exceptions, reverse the judge, and dismiss the complaint.

#### IV. LEGAL PRINCIPLES

Section 2(3) of the Act, as amended by the 1947 Labor Management Relations Act, provides that the term "employee" shall not include "any individual having the status of independent contractor." 29 U.S.C. 2(3). In *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968), the Supreme Court declared that

[t]he obvious purpose of [the exclusion of independent contractors] was to have the Board and the

courts apply general agency principles in distinguishing between employees and independent contractors under the Act. . . . Thus there is no doubt that we should apply the common-law agency test here in distinguishing an employee from an independent contractor.

Id. at 256.

The Court noted that there is no "shorthand formula" for applying the common-law test, and held that under the common-law agency test "all the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law principles." Id. at 258.

In 1989, the Supreme Court considered the meaning of the key term "employee" under the Copyright Act of 1976 in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730. Its discussion in *Reid*, which cited *United Insurance*, expanded and further clarified the analytical tools for distinguishing employees from those who performed "work for hire." The Court found that under the Copyright Act, as "in past cases of statutory interpretation," the appropriate understanding of the term employee was the "general common law of agency . . . [the] federal rule of agency." Id. at 740. The Court cited the Restatement and set out standards for the analysis under common law:

[i]n determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. See Restatement § 220(2) (setting forth a nonexhaustive list of factors relevant to determining whether a hired party is an employee). No one of these factors is determinative.

Id. at 750–752. (citations omitted).

In 1998, in light of *United Insurance, Reid*, and other Supreme Court precedent,<sup>3</sup> the Board reconsidered its standards for determining independent contractor or employee status under the Act in two companion cases, *Roadway Package System*, 326 NLRB 842 (1998), and *Dial-A-Mattress Operating Corp.*, 326 NLRB 884 (1998). The Board noted particularly “*United Insurance’s* observations about the appropriateness of using the common law of agency as the test for determining employee status” and found that Supreme Court precedent “teach[es] us not only that the common law of agency is the standard to measure employee status *but also that we have no authority to change it.*” Id. at 849. (emphasis added). The *Roadway* Board, as had the Supreme Court, took care to strike a balance between the “right of control” factor and the flexible, multifactor approach:

[w]hile we recognize that the common-law agency test described by the Restatement ultimately assesses the amount or degree of control exercised by an employing entity over an individual, we find insufficient basis for the proposition that those factors which do not include the concept of “control” are insignificant when compared to those that do. Section 220(2) of the Restatement refers to 10 pertinent factors as “among others,” thereby specifically permitting the consideration of other relevant factors as well, depending on the factual circumstances presented. . . . Thus, the common-law agency test encompasses a careful examination of all factors and not just those that involve a right of control. . . . To summarize, in determining the distinction between an employee and an independent contractor under Section 2(3) of the Act, we shall apply the common-law agency test and consider all the incidents of the individual’s relationship to the employing entity.

Id. at 850.

The Board then applied these standards to the terms of hire of the company’s delivery drivers, finding them to be employees based, inter alia, on the degree of financial support they received from the company, both in financing and maintaining the delivery vehicles and a guaranteed income; the requirement that the drivers display the corporate logo on their vehicles and be present for work every weekday; and control over the manner of performing the work, by setting the drivers’ schedules, and by prohibiting refusal of delivery.

In *Roadway’s* companion case, *Dial-A Mattress*, supra, 326 NLRB 884, by contrast, the Board found that the

employer’s delivery drivers were independent contractors, based, inter alia, on the employer’s lack of control over their performance of the work, their ownership and control over their vehicles, control over employees they could hire to deliver some or all of the employer’s goods, and the scope that the contractual arrangement between the employer and the drivers allowed for entrepreneurial opportunities: the drivers established their own businesses, often with their own employees, and they could use their vehicles to make deliveries for other companies. The Board distinguished *Dial-A-Mattress* from *Roadway* by noting, inter alia, that the drivers in *Dial-A-Mattress* were, in essence, left on their own to do the job, with no income support, indifference as to the type or condition of the delivery vehicle, lack of company control over scheduling or penalty for failure to appear for work, and lack of imposition of a company identity on the drivers.

In determining the status of the carriers in this case, we rely on the Board’s analysis in *Roadway* and *Dial-A-Mattress*. With respect to the Respondent’s argument that *Roadway* did not change the legal landscape, and that thus the right of control test is still applicable, we note that although *Roadway* does not directly address the continuing viability of the pre-*Roadway* cases, the Board’s analysis in those cases recognized, as does Supreme Court law, that both the right of control and other factors, as set out in the Restatement, are to be used to evaluate claims that hired individuals are independent contractors. Further, we note that since *Roadway*, the Board has continued to cite pre-*Roadway* cases that are consistent with the principles set forth there. The Board will continue to rely on the analysis in such cases, without adopting the Respondent’s characterization of the development of the law.

#### V. APPLICATION OF *ROADWAY* AND *DIAL-A-MATTRESS* FACTORS

##### A. *Roadway* and *Dial-A-Mattress*

We find that a comparison of the common law factors in the instant case with those factors in *Roadway* and *Dial-A-Mattress* demonstrates, on balance, that the carriers are independent contractors. For example, in *Roadway*, in concluding that the drivers were employees, the Board found that the employer retained substantial control over the manner in which the drivers performed their services. See 326 NLRB at 851. We find, however, that the degree of control exercised in the instant case is demonstrably less and akin to that exercised by the employer in *Dial-A-Mattress*. In the instant case, carriers are free to change the order of delivery, to disregard customers’ delivery requests without fear of discipline, and to refuse to deliver to customers they deem unlikely to

<sup>3</sup> See *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995); *Nationwide Mutual Insurance v. Darden*, 503 U.S. 318 (1992).

pay or to whom it would not be economically feasible to deliver. Similarly, in *Dial-A-Mattress*, where the drivers were found to be independent contractors, the drivers were free to change the order of deliveries and to refuse orders without penalty. See 326 NLRB at 891–892.<sup>4</sup>

Also pertinent in the common law analysis is whether the employer provides the tools necessary to perform the work at issue. In *Roadway*, the Board found significant that, although the drivers owned their own trucks, the employer exercised considerable control over the vehicles. See 326 NLRB at 851–852. Conversely, in both *Dial-A-Mattress* and the instant case, the employer is not involved with the drivers'/carriers' ownership of their vehicles. The drivers/carriers own their own vehicles, are responsible for their maintenance, and can use the vehicles for other purposes. See 326 NLRB at 891. Accordingly, this factor weighs in favor of finding independent contractor status.

We also find that the method of compensation, which allowed for a degree of entrepreneurial control, supports a finding that the carriers are independent contractors. Critical to the Board's finding of employee status in *Roadway* was the finding that the employer there tightly controlled the drivers' compensation, such that the drivers did not have much opportunity to affect it—either positively or negatively. See 326 NLRB at 851. Conversely, in *Dial-A-Mattress* the Board found that the drivers had much greater ability to impact their own income, thereby demonstrating the entrepreneurial nature of their employment. See 326 NLRB at 891–892.

In the instant case, we find that the carriers have the ability to impact their own compensation. Most importantly, the carriers can hire full-time substitutes and hold contracts on multiple routes. Moreover, the carriers have complete control over their substitutes' terms and conditions of employment. Carriers are also permitted to deliver other products, including competing newspapers, while delivering the Respondent's newspaper. Finally, the carriers, with help from the Respondent in the form of free promotional newspapers, can solicit new customers and thereby increase the profitability of their routes. These conditions permit a carrier to be an entrepreneur—enabling carriers to take economic risk and reap a corresponding opportunity to profit “from working smarter,

not just harder.” *Corporate Express Delivery Systems v. NLRB*, 292 F.3d 777, 780 (D.C. Cir. 2002).<sup>5</sup>

Another common law factor that weighs in favor of finding independent contractor status is the carriers' performance of their duties without the Respondent's supervision. In *Roadway*, the Board found that the employer supervised its drivers by means of providing extensive training and logistical support. 326 NLRB at 851. In contrast, in *Dial-A-Mattress*, the Board found it significant that the employer did not subject drivers to its work rules. 326 NLRB at 891. Here, like the drivers in *Dial-A-Mattress*, carriers are neither subject to discipline nor subject to the Respondent's employee handbook or other work rules. Accordingly, this factor weighs in favor of finding independent contractor status.

Finally, the common law factor of a party's intent with regard to the nature of the relationship created weighs strongly in favor of finding independent contractor status. The parties believed that they were creating an independent contractor relationship. The carriers' contracts specify that they create an independent contractor relationship. Moreover, the carriers were not covered by any of the Respondent's employee programs.

We do not disagree with the judge's finding that several of the factors in the parties' relationship weigh in favor of employee status. First, the work of the carriers is an integral part of the business of the Respondent.<sup>6</sup> The Respondent is engaged in the publication, distribution, and sale of a newspaper. These carriers carry out the last of these functions. This factor therefore militates in favor of employee status. Second, under the common law, unskilled work weighs in favor of employee status. The work performed by the carriers is not particularly skilled. Third, with respect to the length of time that a carrier serves, this is not a case where the disputed person is hired for a specific project. The carrier is hired for an indefinite period. This factor militates in favor of employee status. Fourth, the common law looks to whether the principal performs the same work, through its own employees, as the persons at issue. Here, the Respondent employs several undisputed employees who make deliveries. These deliveries, however, are to customers who failed to receive their normal delivery. Thus, while the work is similar to the carriers', it is not the same.<sup>7</sup>

<sup>4</sup> We disagree with the judge that the facts relevant to this factor weigh in favor of finding employee status. Although the Respondent set suggested times for the carriers to pick up their papers and a time by which the papers had to be delivered, as described above, the carriers enjoyed significant freedom in how they carried out their responsibilities.

<sup>5</sup> Accordingly, we disagree with the judge's assessment that the carriers' only means of increasing their income was to increase circulation on their routes. As discussed above, the possibility of substitutes, multiple routes, and other delivery options add another significant dimension to the carriers' entrepreneurial opportunities.

<sup>6</sup> Compare a retail business that “hires” a painter to paint the store.

<sup>7</sup> For example, the Respondent's drivers did not deliver a regular route, used vehicles supplied by the Respondent, did not have to pro-

On balance, we find that under the common law test, as applied in *Roadway* and *Dial-A-Mattress*, the factors weigh in favor of finding independent contractor status.

### B. Post-Roadway Cases

We further find, contrary to the judge, that the post-*Roadway* cases in which we have found employee status are distinguishable.<sup>8</sup> Several important factors present in those cases are absent from the instant case. For example, in *Corporate Express*, supra, 332 NLRB 1522, the employer employed employee-drivers who performed the same work as the drivers at issue—a factor under the common law that weighs in favor of employee status. *Id.* at 1522. In contrast, the Respondent does not employ drivers with regular delivery routes. Instead, it has a few employees who only make occasional redeliveries. Also, in *Corporate Express* the workers at issue conducted their business in the employer's name and were not permitted to use their vehicles for other business. *Id.* In contrast, in the instant case, the carriers were prohibited from using the Respondent's logo and can use their vehicles for any purpose. Finally, the workers in *Corporate Express* had no opportunity for entrepreneurial gain or loss. *Id.* As described above, the freedom to hold multiple contracts and to use substitutes provided the carriers here with entrepreneurial opportunities.

Similarly, the facts in *Slay Transportation*, supra, 331 NLRB 1292, are distinguishable. The owner-operators in *Slay Transportation* worked under conditions almost identical to those of the employer's employee-drivers. The owner-operators, as well as the employee-drivers, used the employer's trailers, were paid on the same basis, were subject to the same disciplinary system, and received the same employee manual. *Id.* at 1292–1293. In contrast, in the instant case, the carriers own all their own equipment, are paid differently than the Respondent's other employees, are not subject to any disciplinary system, and are not subject to the Respondent's work rules.

The workers at issue in *Slay Transportation* also had much less opportunity for entrepreneurial gain than do the carriers here. In *Slay Transportation*, the owner-operators could only hire substitutes with the employer's approval, none of the owner-operators worked for other employers, and owner-operators were prohibited from extending credit to customers. *Id.* The carriers in the instant case, in contrast, did not need the Respondent's

approval to hire a substitute, could deliver products for other entities, and could extend credit to customers.

We also find significant differences between the entrepreneurial opportunities available for the drivers we found to be employees in *Stamford Taxi*, supra, 332 NLRB 1372, and the carriers at issue here. For example, in *Stamford Taxi*, the drivers were prohibited from operating independently or working for another company. The respondent retained title to the vehicles used by the drivers, required that the cabs be uniform in appearance and display its logo; did not permit drivers to use their vehicles for their own business or for another cab company; warned the drivers that personal use of the vehicles was not covered by insurance; and maintained a fee system by which the respondent's income was directly correlated to the drivers' fares. *Id.* at 1373. Thus, the drivers' ability to use their vehicles in service for other employers was essentially foreclosed. *Id.* The Respondent here does not impose such limits on its carriers.

### C. Newspaper Carrier Cases

Prior to *Roadway* and *Dial-A-Mattress*, the Board consistently found newspaper carriers to be independent contractors. As discussed above, we do not find that our reasoning in *Roadway* and *Dial-A-Mattress* diminishes the weight of those earlier cases which addressed both the right of control along with the other common law factors.<sup>9</sup>

For example, in *Thomson Newspapers*, supra, 273 NLRB 350, the Board found the carriers to be independent contractors because of the employer's lack of control over the carriers' means of delivering newspapers. For example, the employer did not subject carriers to a disciplinary system, the carriers had discretion to alter their delivery sequence, and the employer did not supervise the carriers or monitor their performance. See *id.* at 352. In addition, however, the Board looked to factors beyond the employer's right of control, such as whether the employer provided the tools necessary for the job, the method of payment, and the parties' intent in creating the relationship. For example, the Board relied in its analysis upon the fact that the carriers owned their vehicles, could hire substitute drivers, were not offered fringe benefits, were hired with the understanding that they were independent contractors, were not paid a salary or hourly wage, and could hold other jobs or deliver other papers. *Id.* These same factors are present in the instant

vide their own supplies, only worked 5 days a week, were supervised, and were paid hourly.

<sup>8</sup> See *Stamford Taxi, Inc.*, 332 NLRB 1372 (2000); *Corporate Express Delivery Systems*, 332 NLRB 1522 (2000), *enfd.* 292 F.3d 777 (D.C. Cir. 2002) ("*Corporate Express*"); *Slay Transportation Co.*, 331 NLRB 1292 (2000).

<sup>9</sup> We note that in some of the pre-*Roadway* cases, although the Board only articulated the right-of-control test, it looked to other common law factors in making its determinations regarding independent-contractor status.

case and likewise demonstrate that the carriers at issue are independent contractors.

Similarly, in finding in *The Evening News*, 308 NLRB 563 (1992), that the carriers were independent contractors, the Board looked beyond the right of control, to common law factors such as those in *Thomson Newspapers*. Thus, the Board noted that the employer did not deduct any withholding from the carriers' compensation, carriers could hire substitutes and helpers, carriers used their own vehicles without the employer's logo, and the parties signed an agreement that purported to create an independent contractor relationship. See *id.* at 564–565. These factors all are present in the instant case and thus lend additional support to our finding that the carriers at issue here are independent contractors.<sup>10</sup>

#### VI. EFFECT OF THE PARTIES' RELATIVE BARGAINING STRENGTH

The GCIU contends that the carriers in this case earn low wages, receive few if any fringe benefits, and have little or no bargaining power. It argues that the Respondent is the more powerful party in the relationship between itself and the carriers, and the Respondent therefore dictates the parameters of the parties' agreement for services. In essence, the argument is that independent contractors should be deemed employees if their economic circumstances are markedly inferior. We cannot agree. We are constrained by the clear language of the statute, which extends the Act's protections to employees and explicitly excludes independent contractors.

We do not disagree that the Respondent is the stronger party here. But the Board does not, and cannot, define the difference between employees and independent contractors by reference to differences in bargaining power. In *United Insurance*, the Supreme Court held that Congress' clear intent was that the Board should apply the common law test in ascertaining whether an individual hired for work is an employee or an independent contractor. Our standards for assessing whether the carriers are employees or independent contractors are mandated by Congressional action and controlling Supreme Court precedent. As long as application of the common law demonstrates that the terms of hire constitute an independent contractor relationship, the carriers will not be found to be employees.

We have also carefully considered our dissenting colleague's argument that the common law test itself requires an analysis of the parties' relative bargaining

strength and that such an analysis compels a finding that the carriers are employees. We respectfully disagree. In fact, the course charted by the dissent is contrary to the statute, precedent, and common law. Concededly, as the dissent points out, the legislatures of other countries have addressed by statute concerns about the status of so-called "dependent contractors". But that is not what the dissent proposes here. Rather, she calls upon the Board to unilaterally remedy perceived deficiencies in the Act, and to apply a test not sanctioned by the Congress or the Supreme Court. This is not an appropriate exercise of the Board's administrative powers. To the extent that the Board's application of the common law of agency test raises similar concerns, it is for Congress, not the Board, to address such concerns. In sum, although other countries have provided in their statutes for the concept of economic dependence, the United States has not done so. We do not opine about the wisdom of such legislation. We merely observe that Congress has not so legislated. It is not appropriate, as advocated by the dissent, for the Board to implement such an alteration of the legal landscape without Congressional direction.

Our colleague argues that the factors to be considered in determining independent contractor vs. employee status include factors that are "economic" in nature. She then posits that "economic dependence" (the disparity between the parties) is a relevant additional factor under the common law of agency. We disagree. The common law of agency, as applied by the Board, does involve an analysis of a business relationship; consequently, some of the factors to be considered are obviously "economic" in nature. But it does not, and under the current state of the law, cannot, follow that the Board must import economic dependence or differences in economic strength as factors, in applying the common law of agency.<sup>11</sup>

<sup>11</sup> Member Schaumber notes that, as a practical matter, his dissenting colleague's analysis would result in significant instability in an already factually intensive and difficult area of the law. Disparities in bargaining power between workers offering their services and companies seeking those services vary from one geographic region to another, and may shift rapidly over time. Moreover, defining the relevant market for any given job position, assessing the precise levels of supply and demand within that market, and determining the actual scope of the impact of such market forces on the particular employment relationship would involve sophisticated economic and statistical analysis for which the Board's regions are ill-equipped. Contrary to the dissent's contention, "economic dependency" or relative bargaining power is not a factor that is either readily ascertainable or quantifiable simply from the terms of the parties' agreement. The fact that a party agrees to particular terms does not mean they were compelled by economic necessity to do so. Nor, unlike the other common law indicia, is bargaining power dictated or controlled by the hiring party; it is a by-product of various and often rapidly fluctuating market forces and cannot be accurately assessed without reference to those same forces. Thus, even if the Board believed it had the leeway to rewrite the common law factors

<sup>10</sup> See also *Glens Falls Newspapers, Inc.*, 303 NLRB 614, 616–617 (1991); *Asheville Citizen-Times Publishing Co.*, 298 NLRB 949 fn. 2 (1990); *Drukker Communications, Inc.*, 277 NLRB 418, 421–424 (1985); *Fort Wayne Newspapers, Inc.*, 263 NLRB 854, 855–856 (1982).

Our dissenting colleague characterizes our reluctance to add an additional factor to the common law test for independent contractor status as “arbitrary.” On the contrary, our position respects the bounds of our administrative authority, and is entirely consistent with the Supreme Court’s approach in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 382 (1969). In that case, cited by our colleague as supporting the proposition that the common law is changing and adaptable, the Court, in fact, looked to Congressional intent as expressed in the Act, for guidance in interpreting the Railway Labor Act, rather than some broader legal-economic context. We follow the Court’s lead here; we find nothing in the Act’s text (or legislative history to the extent relevant) that dictates including economic dependence as a separate factor in assessing independent contractor status.

Moreover, contrary to our dissenting colleague, we find nothing in the precedent that supports importing an economic dependence factor into the common law test. Our colleague asserts that the Court’s decision in *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), has not been totally discredited. Although that may be true, the Court has made clear that it has totally discredited that aspect of *Hearst* that permitted policy considerations to lead the Board to construe independent contractor status “in light of the mischief to be corrected and the end to be attained.” *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 325–326 (1992). Thus, it is clear that Congress rejected the *Hearst* approach of deciding “independent contractor” issues based on policy considerations. In its place, Congress decided that such issues are to be resolved on the basis of the common law. Concededly, the common law itself is adaptable. However, to now say that “economic dependence” is to be made a part of the common law concerning independent contractors is to allow *Hearst* factors to creep back into the Act through the backdoor. We think that this is contrary to the Congressional overruling of *Hearst*.

Our position is not inconsistent with our view in *Brown University*, 342 NLRB No. 42 (2004). We said there that Congress intended the Act to govern relationships that are fundamentally economic in nature, and not relationships that are primarily educational. However, the Taft-Hartley amendments, which specifically excluded independent contractors from coverage under the Act, made clear that the Act does not govern every rela-

tionship in which one party pays another for services.<sup>12</sup> Further, as noted above, we agree that many of the factors to be considered here are economic factors. However, as discussed above, it does not follow that the factor of disparity in economic power is a factor to be considered.<sup>13</sup>

In short, the relationship here is an economic one, contrary to the educational relationship in *Brown*. But it does not follow that *all* economic relationships are employment relationships. Some of them, as here, are independent contractor relationships.

The cases cited by our dissenting colleague do not support her assertion that her approach has been adopted by the courts in their interpretation of other employment-related statutes. The Supreme Court’s decision in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992), dictated that a common law agency test is to be followed. Thus, except for cases arising under the Fair Labor Standards Act, the appropriate test is simply the common law test. *Id.* at 325; see also *Wilde v. County of Kandiyohi*, 15 F.3d 103, 106 (8th Cir. 1994); *Frankel v. Bally, Inc.*, 987 F.2d 86, 90 (2d Cir. 1993). The Sixth Circuit, after initially considering the concept of “economic realities,” subsequently made it clear that it “preferred the common law agency test.” See *Shah v. Deaconess Hospital*, 355 F.3d 496, 499–500 (2004). The Eleventh Circuit did not resolve the issue of whether “economic realities” are to be considered. However, the court did specify that, at most, these economic realities were simply to be considered in light of fundamental common law principles. See *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1495, 1496 (1993).

Our dissenting colleague cites cases that do not explicitly reject consideration of the “economic realities” factor. But even these cases do not support her assertion that we must incorporate an assessment of the parties’ relative bargaining strength into our application of the common law test. For example, independent contractor status was not even at issue in *Roth v. American Hospital Supply Corp.*, 965 F.2d 862 (10th Cir. 1992), and *Lambertson v. Utah Department of Corrections*, 79 F.3d

---

adopted by the Supreme Court, he would find that prudential considerations militate strongly against the inclusion of such an ephemeral and elusive criterion for assessing employee status.

---

<sup>12</sup> It is not always the case that the person “hired” has inferior bargaining power. Anyone who has sought to “hire” a plumber to come out on a weekend to fix an emergency problem has encountered situations where the person hired has significant bargaining strength.

<sup>13</sup> In *Brown University*, Member Schaumber noted that the graduate student assistants at issue there “fit poorly” within the common law definition of “employee.” In his view, however, applying a common-law test to determine the meaning of “independent contractor” as required by controlling Supreme Court precedent, is not inconsistent with finding that the *Brown University* graduate assistants had a primarily educational relationship with their university. In both cases, the Board used the appropriate analytic tool to determine whether there was coverage under the Act.

1024 (10th Cir. 1996).<sup>14</sup> In *Wilde and Folkerson v. Circus Circus Enterprises, Inc.*, 68 F.3d 480 (9th Cir. 1995) (unpublished), the courts only considered employee benefits and tax treatment in their assessment of “economic realities.” See 15 F.3d at 106; 68 F.3d 480, 1995 WL 608432 at \*3. Finally, even in *Frankel*, where the Second Circuit acknowledged that a putative independent contractor’s economic dependence on the hiring party could be relevant, the court limited that relevance to “appropriate circumstances,” without specifying what those circumstances would be. See 987 F.2d at 90–91; see also *Lambertson*, 79 F.3d at 1028. In sum, in none of the cases cited by our dissenting colleague did the court actually look to the economic dependence of the worker at issue to determine whether that worker was an independent contractor. Neither should the Board.

Even if we were to accept our dissenting colleague’s incorporation of an economic dependence factor into the common law test, we would reject her application of that newly configured test. Our colleague has not only incorporated economic dependence as a single factor to be weighed; she has elevated it to be the determinative factor. As mentioned, the dissent makes much of the majority’s acknowledgement that some factors in the common law test point to employee status here. She implicitly concedes, however, that many factors do not support such a finding. For example, she does not dispute that the following factors, which the Board has been directed by the Supreme Court to consider, support a finding of independent contractor status: the carriers provide their own tools, including vehicles, bags, and rubber bands; the Respondent does not supervise the carriers; the carriers do not do business in the Respondent’s name; and the Respondent does not impose any disciplinary system, work rules, or training. In addition, our dissenting colleague ignores several of the ways, discussed above, that the carriers can affect the profitability or “economic realities” of their relationship with the Respondent. For example, the carriers can decide whether to extend credit to customers who request it; through the selection and maintenance of a vehicle and the order of delivery, they can increase their efficiency and reduce their costs; and they can refuse to deliver to customers who are too remote from their route or whose homes are inaccessible. Despite the undisputed existence of substantial support for our conclusion that the common law test and Board precedent dictate a finding that the carriers are independent contractors, our dissenting colleague encourages us to

disregard that support because of an alleged disparity in the parties’ bargaining strength.

Carried to its logical conclusion, our dissenting colleague would have any person who is economically dependent deemed a statutory employee. Clearly, Congress did not intend such a result when it amended the Act to expressly exclude independent contractors from the Act’s jurisdiction.

Our dissenting colleague speculates as to the likelihood that the Respondent would exercise its power to curtail the carriers’ entrepreneurial opportunities. But that is speculation, not evidence. Moreover, according to the dissent, even if the Respondent were to grant the carriers more entrepreneurial opportunities, the carriers still would be considered employees because the potential for the Respondent to alter the relationship would be forever present as a consequence of the Respondent’s greater bargaining power. Our dissenting colleague, thereby, forecloses the possibility that a party with greater bargaining power could ever structure an independent contractor relationship. Again, we find such a result contrary to the intent of Congress in amending the Act to exclude independent contractors.

#### VII. CONCLUSION

Application of the *Roadway* and *Dial-A-Mattress* standards to the carriers in this case establish that they are independent contractors, not employees: the carriers provide their own “tools” of work, their vehicles and supplies; they receive little training from the Respondent; they are not supervised by the Respondent while performing the work; they may hire their own employees; they may work for more than one party; they can solicit new business; and they can subcontract their routes to others. The Union and its amicus focus on the carriers’ asserted lack of bargaining power, and argue that they should be found to be employees, and therefore afforded the opportunities to organize on that basis. The status of persons as employees and independent contractors, however, does not turn on differences in their relative bargaining power. Instead, when Congress excluded independent contractors from the definition of employee set forth in the Act, it was using that term as it was understood at common law. Based on the application of the common law standards, we find that the carriers are independent contractors.

Accordingly, because the carriers are not employees protected by the Act, we reverse the judge and dismiss the complaint allegations that the Respondent’s conduct involving the carriers violated Section 8(a)(3) and (1) of the Act.

<sup>14</sup> In those cases, the question before the courts was which of two employers employed the workers at issue. The workers’ status as employees was not contested.

## ORDER

The complaint is dismissed.

Dated, Washington, D.C. August 27, 2005

---

Robert J. Battista, Chairman

---

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting.

The majority acknowledges that, under the controlling common-law agency test, there are factors indicating that the newspaper carriers here are employees, not independent contractors: The carriers' work is integral to the Respondent newspaper's business; they are relatively unskilled; and they are hired for an indefinite period, rather than for a specific project. But my colleagues insist that the Board cannot rely on evidence that, instead of being business people engaged in the marketplace, the carriers are economically dependent on the newspaper. The newspaper ultimately controls each carrier's working conditions through a contract of adhesion. And it effectively determines the carriers' entrepreneurial opportunities, by controlling the price of the newspapers the carriers buy and sell, by controlling the growth of the carriers' delivery routes, and by controlling the growth of subscribership.

Contrary to the majority's view, economic dependence is a relevant factor in determining employee status under the National Labor Relations Act, just as it is under other federal statutes regulating the workplace. The common-law test, in other words, can accommodate economic reality. Here, the factor of economic dependence—given proper weight, along with the other factors the majority concedes indicate employee status—establishes that the carriers are statutory employees.

Given the current business trend toward flexible, non-traditional employment relationships, including the increasing use of "contract labor," it is imperative that the Board keep federal labor law current within the statutory framework established by Congress. In this regard, the employee/independent contractor issue is fundamental, because it dictates what legal rights workers have. Other countries addressing the issue, the economic-dependence factor in particular, have created explicit statutory categories, for instance, "dependent contractor" and "employee-like person," to resolve the matter. In the United States, however, the common-law test, as currently applied in the federal courts, allows us to evaluate eco-

nomie dependence without an amendment of the National Labor Relations Act.

## I.

The threshold issue of whether a worker is a covered employee, or an excluded independent contractor, arises repeatedly in various federal employment-law contexts. When a statute concerning employment fails to provide a substantive definition of the term "employee"—the Act, among others<sup>1</sup>—the Supreme Court mandates that the common-law agency test be used to determine whether an individual is an employee or an independent contractor. *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 322–325 (1992).<sup>2</sup> The federal courts and the Board rely primarily on the *Restatement (Second) of Agency*, Section 220 (1958) for guidance in applying the test. The Board has observed that Section 220(2) "refers to 10 pertinent factors as 'among others,' thereby specifically permitting the consideration of other relevant factors as well, depending on the factual circumstances presented."<sup>3</sup>

Every federal appellate court that has addressed the matter has found that economic factors shaping the relationship between a putative employer and a putative employee constitute just such an additional relevant consideration in applying the common law test.<sup>4</sup> In *Frankel v. Bally, Inc.*, supra, for example, the Second Circuit made plain that "factors relating to an individual's economic dependence upon the hiring party may be taken into account under the common law agency test. . ." 987 F.2d.

<sup>1</sup> Sec. 2(3) of the Act defines an "employee" as including "any employee" and excluding, inter alia, "any individual having the status of an independent contractor."

<sup>2</sup> The Supreme Court in *Darden* applied the Employee Retirement Income Security Act. See also *Clackamas Gastroenterology Associates v. Wells*, 538 U.S. 440, 444–445 (2003) (Americans with Disabilities Act).

<sup>3</sup> *Roadway Package System, Inc.*, 326 NLRB 842, 850 (1998).

<sup>4</sup> See *Lambertson v. Utah Dept. of Corrections*, 79 F.3d 1024, 1028 (10th Cir. 1996) (Title VII); *Folkerson v. Circus Circus Enterprises, Inc.*, 68 F.3d 480 (table), 1995 WL 608432, at 3 (9th Cir. 1995) (Title VII); *Wilde v. County of Kaniyohi*, 15 F.3d 103, 105–106 (8th Cir. 1994) (Title VII); *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1495–1496 (11th Cir. 1993) (Age Discrimination in Employment Act); *Frankel v. Bally, Inc.*, 987 F.2d 86, 89–91 (2d Cir. 1993) (ADEA). See also *Shah v. Deaconess Hospital*, 355 F.3d 496, 499 (6th Cir. 2004) (ADEA and Title VII). Compare *Roth v. American Hospital Supply Corp.*, 965 F.2d 862, 867–868 (10th Cir. 1992) (relying in part on individual's "considerable bargaining power in contract negotiations" to find no employee status under ERISA).

My colleagues seek to distinguish these cases by their particular circumstances. They miss my point. These cases are cited because the courts have endorsed the use of economic factors, including economic dependence, in applying the common law test. These cases are not cited because they involve virtually identical factual circumstances.

at 90.<sup>5</sup> As some courts have pointed out,<sup>6</sup> the Supreme Court itself acknowledged the relevance of economic factors when it included employee benefits and the tax treatment of employees in its explanation of the common-law test. See *Darden*, supra, 503 U.S. at 324. The Board, too, has endorsed the analysis of economic factors by acknowledging “entrepreneurial opportunity”—clearly an economic concept—as relevant under the common-law test.<sup>7</sup>

Here, then, it is entirely appropriate to examine the economic relationship between the Respondent and the carriers to determine whether the carriers are economically independent business people, or substantially dependent on the Respondent for their livelihood.

My colleagues “do not disagree that the Respondent is the stronger party here,” but assert that the “Board does not, and cannot, define the difference between employees and independent contractors by reference to differences in bargaining power.” This factor, the majority argues, is immaterial under the controlling common-law test. But this is not an accurate statement of the law. To the extent that differences in bargaining power expose a significant economic dependence of the putative employee on the putative employer, it is a relevant consideration under the common law agency test, as I have shown.

It is hard to reconcile the majority’s approach here with the Board’s recent decision in *Brown University*, 342 NLRB No. 42 (2004), which involved the employee status of graduate student assistants. There, the majority asserted that the “issue of employee status” is “not to be decided purely on the basis of older common-law concepts.” *Id.*, slip op. at 9 (emphasis added). Instead, the majority focused on the economic relationship—which the majority found secondary—between the graduate students and their university. *Id.* at 7. Here, in contrast, the majority is not interested in the economic relationship between the carriers and the newspaper, but purely in supposed “older common-law concepts.” My dispute with the majority in this case is not over whether the common-law test is controlling, but only as to whether economic factors may be considered under that test.<sup>8</sup>

<sup>5</sup> Accord *Daughtrey v. Honeywell, Inc.*, supra, 3 F.3d at 1495. See also *Thomas v. Held*, 941 F.Supp. 444, 451 at fn. 9 (S.D.N.Y. 1996); *McFadden-Peel v. Staten Island Cable*, 873 F.Supp. 757, 761 at fn. 3 (E.D.N.Y. 1994).

<sup>6</sup> *Folkerson v. Circus Circus Enterprises*, supra, 1995 WL 608432 at 3; *Wilde v. County of Kandiyohi*, supra, 15 F.3d at 106.

<sup>7</sup> *Roadway Package System*, supra, 326 NLRB at 851. Indeed, in *Corporate Express Delivery Systems v. NLRB*, 292 F.3d 777 (D.C. Cir. 2002), the District of Columbia Circuit recognized the increasing emphasis on “entrepreneurial opportunity” in current common-law analyses of the independent contractor question. *Id.* at 780–781.

<sup>8</sup> Member Walsh and I dissented in *Brown University*, supra. In our view, it was clear both that under the common-law test, graduate stu-

Compare *Brown* with the recent decision in *Cuddeback v. Florida Board of Education*, 381 F.3d 1230, (11th Cir. Fla. 2004), where the court found that graduate student assistants were “employees” within Title VII, applying common law concepts and “tak[ing] into account the economic realities of the situation.”

## II.

Taking economic factors into account in this case should lead to a finding of employee status. The Respondent newspaper’s substantial economic advantage over the carriers results in a relationship of economic dependence on the newspaper. It is persuasive evidence that the carriers are employees, not independent contractors.

The relationship between the newspaper and each carrier is governed by a contract of adhesion in the newspaper’s favor. It is primary evidence of the newspaper’s contractual right, and power, to control the relationship. For example, the standard contract that the Respondent presents to each carrier states that the newspaper can terminate the agreement “for cause” (undefined) without notice. More significantly, the contract affords the newspaper the right to change any of the contract’s terms unilaterally on 30 days notice. No corresponding contractual right of modification is provided to the carrier.<sup>9</sup>

In the basic economic mechanism between the parties, the Respondent sells newspapers to the carrier, and the carrier resells them to subscribers along a predetermined delivery route. The Respondent’s contract with the carrier sets the wholesale price at which the Respondent sells newspapers to the carrier. The Respondent also sets the retail price for sale to subscribers; it is printed on the front page of each newspaper. In addition, the Respondent has the unilateral power to change the wholesale price on 30 days notice. Therefore, the price of the product that the carrier sells to customers is fully controlled by the Respondent—and, with it, a key component of the carrier’s profit margin. This basic transaction between the Respondent and the carrier manifests the carrier’s fundamental business dependence on the newspaper. It precludes any opportunity for the carrier to independently enhance his profits based on the market value of his product.

Conceivably, a carrier can increase his profit by enlarging his delivery route or by taking on multiple

dents are statutory employees and that “economic realities” supported a finding of statutory coverage. 342 NLRB No. 42, slip op. at 13–14 & fn. 10.

<sup>9</sup> Contrary to my colleagues’ view, the fact that the contract labels the carrier an “independent contractor” deserves little weight, in view of the newspaper’s unilateral control of contract terms. It may manifest the Respondent’s aim, but it is hardly an accurate gauge of the carrier’s.

routes. But the Respondent, not the carrier, holds a proprietary interest in each route. The newspaper determines every delivery route and can alter the route unilaterally if it chooses—for example, if the Respondent decides that the route is too large. In this way, the Respondent maintains essential control of a route's value to the carrier. Any realistic opportunity for the carrier to enhance his earnings by extending his route or servicing multiple routes is sharply circumscribed and dependent on the will of the Respondent.

Individually or collectively, none of the factors to which the majority points, tips the balance in favor of finding independent-contractor status:

(1) The majority observes that a carrier can personally solicit new customers and thereby independently build the value of his route. However, the Respondent provides free newspapers to the carriers to lure new subscribers, and the Respondent runs periodic promotional campaigns during which the carriers distribute the free newspapers. The Respondent also solicits new customers through telemarketing. Ultimately, as the judge pointed out, most new business results from customer calls directly to the Respondent, not from carrier contacts. Thus, the Respondent's efforts, not the carrier's, appear to constitute the primary basis for enhancing subscribership on a carrier's route. Again, this marks the carrier's economic dependence on the Respondent.

(2) My colleagues also find that nothing in the parties' contract precludes a carrier from delivering other products while on his route, even competing newspapers. In addition, they note that a carrier can hire substitutes to service his routes. This creates, at most, the appearance of independent entrepreneurial opportunity for the carrier. The Respondent has the power to terminate such activities on no more than 30 days notice. It certainly would do so the moment its own profitability in the route is threatened, whether by the sale of competing products or by a substitute's poor service.

(3) The majority points out that the carriers control the means of delivery, i.e., they provide their own vehicles. However, the Respondent subsidizes the carriers by paying a portion of their gasoline costs. The majority also observes that the carriers are free to hold other jobs. However, as the judge found, delivery of the Respondent's newspaper is the primary source of employment for most of the carriers. Thus, both of these matters further evince the carriers' dependence on the Respondent.

In sum, the carriers' entrepreneurial opportunities are largely illusory: they exist at the newspaper's pleasure

and they require the newspaper's support.<sup>10</sup> Consequently, the carriers depend substantially on the Respondent's discretion, not simply their own efforts, for their economic success or failure.<sup>11</sup>

The majority concedes that there is considerable evidence otherwise demonstrating that the carriers are employees, rather than independent contractors. The carriers' delivery work is an integral part of the newspaper's business. They are relatively unskilled laborers. They are hired for an indefinite period rather than for a specific project. The newspaper retains other, undisputed employees who perform work similar to the carriers'. Moreover, as the judge found, the newspaper dictates the carriers' days of work and delivery times, and maintains the financial records that support the carriers' work.

When these factors are matched with the evidence establishing the carriers' economic dependence on the newspaper, the result is clear under the common-law agency test: the carriers are employees under Section 2(3) of the Act.

### III.

In analyzing the difference between an "employee" and an "independent contractor," the federal courts have established that the current common-law agency test can accommodate the economic dependency question quite adequately.<sup>12</sup> Labor and employment laws in other industrialized countries have recognized the significance of economic dependency as well.<sup>13</sup> In Canada, for example, collective-bargaining rights for "dependent contractors" are specifically covered by statute. In Germany, employment and labor statutes recognize "employee-like persons" as employees for purposes of the law. Similar

<sup>10</sup> "[I]f a company offers its workers entrepreneurial opportunities that they cannot realistically take, then that does not add any weight to the Company's claim that the workers are independent contractors." *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 860 (D.C. Cir. 1995).

<sup>11</sup> The majority protests that there is no evidence that the Respondent would actually exercise its power to curtail the carriers' entrepreneurial opportunities. However, it is well-established that the right, not the exercise, of control over workers' manner and means of job performance is critical in the independent-contractor analysis. See *C.C. Eastern, Inc. v. NLRB*, supra, 60 F.3d at 860. The record establishes that the Respondent has the right to control not only entrepreneurial opportunities, but every other significant facet of the carriers' work, in particular by its ability to unilaterally alter the carrier contract.

<sup>12</sup> In addition to the case precedent discussed in Part I above, see Burdick, *Principles of Agency Permit the NLRB to Consider Additional Factors of Entrepreneurial Independence and the Relative Dependence of Employees When Determining Independent Contractor Status Under Section 2(3)*, 15 Hofstra Lab. & Employment L.J. 75, 125-131 (1997).

<sup>13</sup> It is entirely appropriate to review relevant legal developments in other countries in evaluating the state of the law in the United States. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 2481, 2483 (2003); *Thompson v. Oklahoma*, 487 U.S. 815, 830-831 (1988).

legal developments are ongoing in Sweden.<sup>14</sup> These statutory categories address modern employment relationships in which the worker, although not reflecting all of the traditional markers of an “employee,” is economically dependent on the company, unlike a true independent contractor. Similarly, the Board needs to update its application of the common law test to properly address current labor market trends and their impact on how *employment* relationships are actually structured.

The majority contends that consideration of the economic-dependence factor is “contrary to the statute, precedent, and common law.” That contention misunderstands the Act, our precedent, the common law, and my position here. Section 2(3) of the Act does not define “independent contractor.” The Act’s legislative history, of course, makes clear that the Board must consider the common-law test for independent-contractor status. Congress presumably understood that the “common law has always been dynamic and adaptable to changing times. . . .” *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969). The Supreme Court, in turn, has observed that “[i]n doubtful cases, resort must still be had to economic and policy considerations to infuse §2(3) with meaning.” *Allied Chemical & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 168 (1971). Indeed, the common-law test *incorporates* “economic considerations,” our decisions take account of such considerations, and the majority seems to acknowledge as much.

My colleagues, however, draw the line at considering economic dependence in determining independent-contractor status. Nothing in the Act, Board precedent, or the nature of the common-law test supports this step. To be clear, the Board cannot treat economic dependence as the determinative factor in the independent-contractor analysis. That position is foreclosed by Congress’ rejection of the approach reflected in the Supreme Court’s decision in *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), in favor of the common law test. See *Darden*, *supra*, 503 U.S. at 324–325.<sup>15</sup> Nonetheless, the Su-

preme Court has said that the approach of *Hearst Publications* has “not . . . been totally discredited.” *Allied Chemical & Alkali Workers*, *supra*, 404 U.S. at 168. It is therefore appropriate to treat economic dependence as one relevant factor among many, “with no one factor being decisive.” *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 258 (1968).<sup>16</sup>

The majority’s present approach to the common law test sifts through the relevant evidence, but chooses to address only those economic factors that support a finding of independent contractor status for the carriers. Thus, the majority finds the “entrepreneurial opportunities” afforded to the carriers in their relationship with the Respondent a significant indication that they are independent contractors. Yet my colleagues reject outright any consideration of the economic dependence of the carriers on the Respondent for their livelihood, a factor that undermines the viability of the carriers’ supposed entrepreneurial opportunities. That position is arbitrary.

#### IV.

Although the carrier-newspaper employment relationship in this case is not a new one, similar contractor-like relationships have become prevalent in more and more workplaces as companies increasingly seek flexibility in a more competitive economic climate. The economic dependency evident in many of these “contract labor” relationships makes the question of labor law coverage worthy of a fresh evaluation.<sup>17</sup> It is critical, then, for the Board to acknowledge the role that economic depend-

---

the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing.” 322 U.S. at 121. It predicted that adoption of the common-law test—“import[ing] this mass of technicality” into the NLRA—“would be ultimately to defeat, in part at least, the achievement of the statute’s objectives,” because “[m]yriad forms of service relationship, with infinite and subtle variations in the terms of employment, blanket the nation’s economy.” *Id.* at 125–127.

<sup>16</sup> Contrary to Member Schaumber’s contention, “prudential considerations” do not counsel against recognizing economic dependence as a relevant factor. No “sophisticated economic and statistical analysis” of labor markets is required. The inquiry, rather, focuses on the readily-ascertainable facts of the particular economic relationship at issue, such as the contract of adhesion here between the newspaper and the carriers, as well as the newspaper’s ability to effectively determine the carriers’ entrepreneurial opportunities. In other words, economic dependence is analyzed as it is concretely manifested, not in the abstract. Because every proceeding involving an alleged independent-contractor relationship is already fact-intensive and case-specific—the Board would never hold, for example, that newspaper carriers as a class are independent contractors—considering economic dependence would make only a marginal difference in the complexity of the inquiry.

<sup>17</sup> See generally, Lobel, *The Slipperiness of Stability*, *supra*; International Labor Organization: *The scope of the employment relationship*, Report V, International Labour Conference, 91st Session, Geneva, 2003, accessible at <http://www.ilo.org/public/english/standards/reln/ilc/ilc91/pdf/rep-v.pdf>.

---

<sup>14</sup> See Lobel, *The Slipperiness of Stability: Contracting for Flexible and Triangular Employment Relationships in the New Economy*, 10 Tex. Wesleyan L. Rev. 109, 134 (2003). Legislative changes of this kind have, in the past, been suggested for the National Labor Relations Act as well. See Linder, *Towards Universal Worker Coverage Under the National Labor Relations Act: Making Room for Uncontrolled Employees, Dependent Contractors, and Employee-Like Persons*, 66 U. Det. L. Rev. 555, (1989). In my view, the Act need not be amended. The statute itself incorporates the developing common law, allowing the Board—indeed, requiring it—to consider economic realities insofar as the common law does in this area.

<sup>15</sup> In *Hearst*, the Supreme Court observed that “[f]ew problems in the law have given greater variety of application and conflict in results than

ency plays in both traditional and newer, nontraditional employment relationships. As developing business practices blur the distinction between a classic employee and a classic independent contractor, the Board must ensure that the rights guaranteed by the Act do not erode for workers Congress intended to protect.

My colleagues, however, have chosen to apply a rigid, outdated version of the common law agency test, one which ignores relevant economic factors and contradicts the true spirit of the common law: flexibility and growth to match a society in constant development.<sup>18</sup> As a result, the Board is now out of step with present legal trends, both in this country and worldwide. Workers who not only would benefit from the Act's protection, but who are legally entitled to it, will bear the consequences.

Dated, Washington, D.C. August 27, 2005

---

Wilma B. Liebman, Member

#### NATIONAL LABOR RELATIONS BOARD

*Lyn R. Buckley, Esq.* and *Daniel G. Zarate, Esq.* for the General Counsel.

*L. Michael Zinser, Esq.* and *Matthew Salada, Esq.*, for the Respondent.

#### DECISION<sup>1</sup>

ALBERT A. METZ, Administrative Law Judge. The issues presented are (1) whether the Respondent's newspaper carriers and haulers are employees or independent contractors, and (2) whether certain actions of the Respondent involving carriers violated Section 8(a)(1) and (3) of the National Labor Relations Act (Act).<sup>2</sup> On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the parties' briefs, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION AND LABOR ORGANIZATION

The Respondent is a corporation that has a place of business in St. Joseph, Missouri, where it is engaged in the newspaper business. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I further find that the record shows that the Teamsters Union Local 460 (Union) is a labor organization within the meaning of Section 2(5) of the Act.

<sup>18</sup> "However much we may codify the law into a series of seemingly self-sufficient propositions, those propositions will be but a phase in a continuous growth." O.W. Holmes, Jr., *The Common Law* 37 (1881).

<sup>1</sup> This case was heard at Overland Park, Kansas, on January 23–25, March 20–23, and April 10–13, 2001.

<sup>2</sup> 29 U.S.C. § 158 (a)(1) and (3).

##### II. BACKGROUND

The workers in dispute in this case are classified as carriers or haulers. The Respondent asserts that these persons are independent contractors and not covered by the provisions of the Act. The Government claims these workers are employees whose union and concerted activities are shielded from unfair labor practices under the Act. The Government further asserts that the Respondent committed certain unfair labor practices involving the carriers. The Respondent denies that any of its conduct violated the Act.

##### III. INDEPENDENT CONTRACTOR ISSUE

The carriers deliver newspapers to customers. The haulers pick up bundles of newspapers at Respondent's loading dock or at a remote drop point and deliver them to another yet more remote drop point for pickup by carriers. Haulers may also have separate newspaper routes where they deliver directly to customers. Both of these classifications will be referred to in this decision as carriers unless a distinction between the two is necessary for clarity.

The Respondent's printing plant is located in St. Joseph, Missouri. Its newspaper is circulated in St. Joseph and the surrounding towns and rural areas. Carriers are responsible for deliveries on various types of routes. City routes include St. Joseph and adjoining communities. In addition to home delivery, carriers may stock newspaper racks and make deliveries to news, dealers. Some home delivery routes also include taking bundles to yet a further location for a drop. State carriers deliver the rural routes and to remote towns. Some State routes also include racks, dealers, and deliveries to a post office for shipment of papers.

Kevin Smith is the Respondent's circulation department director. Managers and supervisors under his direction include city marketing director, single copy sales manager, city route manager, city home delivery manager, approximately 11 district managers, and 8 depot managers. The circulation department is responsible to see that the newspaper is distributed to readers and the associated service functions involved in this aspect of the business.

When carriers are hired they do not fill out applications or go through the drug testing procedure required of Respondent's employees. The carriers are not subject to the Respondent's employees' rules and regulations as set forth in its employee policy handbook.

Carriers are solicited for hire by newspaper advertisements and word-of-mouth. District managers typically talk to prospective carriers about employment and the carrier contract that details the work relationship with the Respondent. The Respondent has three standard contracts that cover the work of carriers, haulers, and city single copy/rack and dealer carriers.

The carriers' contracts emphasize they will be working as independent contractors. The carrier contracts state that "... nothing herein shall be deemed to have created a partnership, a joint venture, a master servant relationship or employer-employee relationship between them." (R. Exh. 54 p. 2 item 15.)

The contracts state that the carrier is granted the nonexclusive right to purchase, sell, and deliver the Respondent's news-

paper in an area designated by a route number. The carrier is given the right to control the method and means of delivering the newspaper.

The carriers sign their contracts as individuals. There is no evidence that any of the carriers are organized as a corporation, partnership, or other business entity. Neither was there a showing that the carriers advertise their services, have separate business addresses, business licenses, business bank accounts, tax identification numbers, or maintain worker's compensation insurance.

The carriers' contracts prohibit them from displaying the Respondent's name on their vehicles. The carriers do not wear uniforms.

The contracts mandate that the carriers are responsible for providing their delivery services 7 days a week. The contracts direct that the carriers deliver their newspapers before 6 a.m. on weekdays and Saturdays, and before 6:30 a.m. on Sundays. The carrier's contract states that carriers are to provide the Respondent with the name of a person who can be called if the carrier is unavailable "for necessary contacts."

Carriers normally purchase their newspapers from the Respondent based on a contractual rate and resell the papers at a retail rate. The carrier agrees that he will purchase sufficient copies of the newspaper in order to supply the subscribers in his delivery area. Certain carriers negotiate with the Respondent to deliver newspapers at a negotiated per piece rate. These deliveries are made to newspaper racks and single copy outlets.

The carriers are responsible for providing a substitute if they are unable to personally perform their contractual obligations. The contracts allow carriers to hire helpers and substitutes without prior approval from the Respondent, but carriers have no right to assign or subcontract their routes nor can they trade routes.

The carriers have no interest or property right in the route, the bundle drop site, or the subscribers. The contracts have a "product integrity clause" prohibiting carriers from writing on papers or adding unauthorized advertising material to the newspapers.

The carriers' one large investment is the vehicle they need to perform their deliveries. The carriers must provide their vehicles and as well as the resources needed to operate and maintain the vehicle, including gas, repairs, and insurance. The Respondent does not require any particular type of vehicle be used. If a carrier is unable to use his regular vehicle, he is responsible to obtain a replacement. The Respondent does not provide loaner vehicles to the carriers nor does it provide any repair service arrangements for the carriers. They are required to indemnify the Respondent and are responsible for damages caused by them or their substitute carriers while delivering newspapers. The price of gasoline has recently risen dramatically. The Respondent voluntarily initiated a plan whereby it pays subsidies to the carriers to cover the increased gas cost they bear in operating their vehicles.

Contracted carriers must purchase their own supplies, such as rubber bands and bags. These supplies are available through the Respondent, but carriers are free to purchase them from any source.

The carriers are not required to purchase any specialized equipment for their work. The Respondent supplies the chute and conveyor system for loading the newspapers into the vehicles at the plant. No special licenses are required to do their work.

Should a carrier default in making his deliveries the Respondent will make arrangements to deliver the route and charge him for the cost it incurs. Carrier contracts contain provisions for a bond to cover such costs. Bond payments are deducted from carriers' credits each month until the stated amount of the bond is paid. Respondent sets the amount of the bond. The record shows that some bonds amounted to \$1000 with monthly deductions for their purchase being around \$30. The Respondent exercises its discretion in collecting against the bond. The Respondent charges carriers the cost of completing their contract when they fail to give 30-day notice before terminating their routes. This has taken the form of deducting the costs from route profits and bond monies.

The Respondent may, at its option, terminate the contract immediately and without prior notice, undertake the carriers' obligations under the contract and charge him for the reasonable cost of performing such obligations for the remainder of the month in which such termination occurs. (R. Exh.54 p. 2 item 11). The carrier also agrees to pay the Respondent a service charge if a customer complains about a delivery and the Respondent has to redeliver the newspaper.

Either party must give the other party 30 days written notice before terminating the contract "without cause." The Respondent gives 30 days notice before implementing a change in the terms of the contract. The Respondent has the right to change the wholesale price in its discretion upon 30 day written notice to the carrier. Carriers that make deliveries to newspaper racks lease the racks from the Respondent.

The Respondent has the right to deliver newspapers in the carriers' areas. One example of how this may occur is when the Respondent decides to deliver papers at mid-day in order to replenish racks or news dealers that have run short of papers after the early morning carrier delivery. The Respondent decides where racks are located and what news dealers will receive papers. The Respondent may eliminate or add newspaper locations based on its assessment of profitability. The Respondent also decides on the number of papers (the "draw") that racks and dealers receive.

Carriers may receive payments from the Respondent or the customer. Most customers pay in advance for their newspapers. The carrier contract mandates that the Respondent holds monies received from paid-in-advance accounts and will credit the carrier monthly for such payment. The contract does not detail the operation of the escrow trust account such as how, if at all, any interest is earned or distributed. The customers who pay in advance are considered carrier collects and it is the responsibility of the carrier to obtain that payment. Customers who do not pay their accounts are given over to the carriers as carrier collect customers.

The contracts establish how much the carrier is charged for each paper he delivers. Carriers receive a monthly charge sheet from the Respondent that states the carrier's debits (e.g. bond payments, rack rentals, redelivery charges) and credits (e.g.

paid in advance accounts, gasoline subsidy, and credit for unsold papers in racks).

The contracts state that the Respondent may change the wholesale cost the carriers are charged for newspapers upon 30 day written notice. The papers are printed with a price on their face. If the retail price is changed the Respondent will give advance notice of that change to carriers and customers.

The Respondent posts a list of the sequence in which carriers will receive their papers for loading at the plant dock. The Respondent instructs carriers as to when they are to make drops in relation to other duties performed on the route. This includes instructions as to when mailbags of newspapers are to be delivered to post offices. The papers come down a metal chute that directs the papers into the carriers' vehicle. Carriers at remote sites pick up their bundles at locations designated by the Respondent as hauler drops. Haulers who pick up bundles at the dock have message boxes at the dock marked by route number that is used by the Respondent to pass along instructions to the haulers.

When carriers start work they are commonly given a route book or a tape recording that details the delivery points for the route. The source of this information may be the route manager or the current route carrier. Managers or the carrier quitting a route may ride with a new carrier to aid him in learning the route.

The newspaper bundles contain messages that notify the carrier of such things as new customers' names and addresses, where the customer wants the paper delivered (e. g. in the drive way or on the porch), and temporary stops of delivery for vacationing customers, etc. The Respondent gives the carriers "all subscriber" lists for their routes that show the address, name, billing method (carrier collect or office pay), account expiration, phone, and the days for delivery. In addition to these daily instructions, the Respondent's managers may send memos to carriers or talk to them.

The Respondent dictates the product to be delivered to the customer. Thus the size of the newspaper, the bundle size and the number of inserts is determined by the Respondent. The Respondent determines what promotions will be used to attempt to increase circulation and when these promotions will occur. The Respondent decides when the carriers are to insert supplements, such as advertising into newspapers. In November, 1999, when the Respondent decided that the carriers were to insert ad sections into the Sunday papers it notified employees how much it would pay for these new duties.

Single copy rack and dealer carriers pick up route sheets and an electronic wand at the Respondent's dock each day. The wands (The Bellatrix system) electronically record information relating to each rack including the number of newspapers and time of delivery to a rack. The carriers return the wands to the Respondent at the end of each shift. In 2000, carriers selling papers in racks filed monthly reports, attached the headers of unsold papers, and were reimbursed for the unsold papers. The Respondent bills news dealers and arranges for the collection of money for these accounts. The Respondent determines the location of the racks and the dealers and informs the carrier of these changes. The Respondent sets the price of the papers purchased from newspaper racks.

The Respondent determines the geographical area covered by a particular route. The Respondent, in its discretion, may cut or enlarge a route. A particular route may not be exclusive to a given carrier. Thus, deliveries to racks or retail outlets may be part of a different route even though it is within another carrier's territory.

The Respondent issues the carriers IRS 1099 forms each year showing their earnings. No income taxes are withheld from the carriers' earnings. Carriers testified that they file Schedule C business tax returns. There was no evidence that carriers paid unemployment or workers compensation payments for themselves or their substitutes. Nor was there any showing that the Respondent paid such monies on behalf of the carriers.

#### IV. ANALYSIS OF INDEPENDENT CONTRACTOR ISSUE

Section 2(3) of the Act provides that the term "employee" shall not include "any individual having the status of an independent contractor." The Board in *Roadway Package System*, 326 NLRB 842 (1998), recently reexamined the test for determining whether an individual is an employee or an independent contractor. The Board used the common-law agency test as applied by the Supreme Court in *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968) and considered all of the incidents of the relationship between the company and certain drivers to conclude that those drivers were employees under Section 2(3) of the Act.

The test the Board adopted in *Roadway* is the multifactor analysis of the *Restatement (Second) of Agency*, Section 220, which lists the following 10 factors "among others" that should be considered:

1. The extent of control the employer exercises over the individual's work details.
2. Whether the person employed is engaged in a distinct occupation or business.
3. Whether the work of that occupation is usually performed under an employer's supervision.
4. The skill required by the occupation.
5. Whether the employer or the worker supplies instrumentalities, tools, and the place of work.
6. The length of employment.
7. Whether payment is made according to the time spent or by the job.
8. Whether the work is part of the employer's regular business.
9. Whether the parties believe they are creating an employer-employee relationship.
10. Whether "the principal is or is not in the business."

The Board in *Roadway*, at 850, stated that the "right to control" the manner and means of the work performed by the individual whose status is at issue is not the exclusive consideration in making an employee versus independent contractor determination:

While we recognize that the common-law agency test described by the Restatement ultimately assesses the amount or degree of control exercised by an employing entity over an individual, we find insufficient basis for the proposition that

those factors which do not include the concept of "control" are insignificant when compared to those that do.

In weighing the criteria set forth by the Board in *Roadway* the following factors stand out about the relationship between the Respondent and the carriers. The carrier contracts are clearly focused on establishing the carriers as independent contractors. The Respondent does not withhold income taxes from amounts owed the carriers. The carriers are given 1099 IRS forms by the Respondent and they file their income taxes as schedule C business operations.

The carriers perform a vital function that is an integral part of the Respondent's regular business—delivering its daily newspaper to the customers. Should a carrier fail to perform the Respondent will assume the responsibility for fulfilling his obligations and charge the carrier for that service. If a customer complains about not getting a delivery the Respondent assumes the responsibility of successfully making the delivery. The carriers perform their work using their own vehicles for which they are totally responsible. The carriers' major business expense is their motor vehicles. They must bear the cost of maintaining and insuring their vehicles. The Respondent pays them a fuel differential to help them absorb the recent higher cost of gasoline. They do not wear uniforms or attach insignia to their vehicles so as to identify them as working for the Respondent. The carriers have discretion in how they deliver their routes and provide their own substitute carriers on terms that they independently establish. The carriers are allowed the flexibility to run their routes in the order that best suits them. The Respondent can make changes to the nonexclusive routes resulting in the diminution of carriers compensation.

The Respondent's daily newspaper must be delivered in a timely manner to its customers. This is a critical function of the Respondent's business because of the time sensitive nature of its product. The Respondent establishes a daily deadline for the carriers to complete their routes. The Respondent defines the carriers' nonexclusive routes. The carriers are confined to their routes but the Respondent reserves to right to change and intrude on these areas in its discretion. If customers complain about the delivery of their papers, the Respondent notifies the carriers to correct the problem. If there is a problem with decreased circulation the carrier may be held accountable even though the contracts do not specify that a carrier is responsible for maintaining any stated level of circulation. If a paper is not delivered in the immediate St. Joseph area the Respondent will have its own personnel to deliver another newspaper. The Respondent's notifies the carriers of new customers and changes requested by existing customers.

The carriers have little ability to significantly increase the amount they earn by entrepreneurial efforts. The contracts set the wholesale price the carriers will be paid for their newspapers. The carriers' compensation, in general, is based on the number of papers or bundles they deliver considering the distance they must drive on their assigned routes. The newspapers bear a printed price on their face. The record does not reflect that it is common for carriers to vary from that printed price when charging customers. Carriers can increase their income by soliciting business, but the record indicates that most new busi-

ness comes from customer calls to the Respondent. This is then routinely passed on to the carrier with instructions to start the delivery or change it depending on the wishes of the customer. The Respondent takes the initiative to promote its product with periodic sales campaigns and the carriers are encouraged to participate in these efforts. Much of the carriers' effort consists of delivering the promotional papers to nonsubscribers.

Carriers testified that they do not consider themselves independent newspaper delivery businesses. Other than filing Schedule C business tax returns, little of their conduct supports a demonstration that they have set themselves up as independent businesses. They do not incorporate or form other business entities. Nor do they get business licenses, maintain business checking accounts, establish business offices, etc. Other than some few carrier collects, the Respondent maintains the bookkeeping system by which the carriers are compensated. The Respondent is a direct link to the customer in soliciting business, taking their phone calls, and passing on to the carriers the customers' wishes. The Respondent regularly communicates instructions to the carriers regarding their routes and service. Bundle top instructions, written and verbal instructions from managers, by phone and in person, the responsibility of the managers to emphasize "customer service" with the carriers are examples of the Respondent's influence on the carriers daily work.

The Respondent has its own parttime employees in the St. Joseph area that do redelivery of newspapers to locations where there was a problem with the carriers' original delivery. The Respondent also directly employs drivers that make hauls of newspaper bundles to the St. Joseph mid-town depot and to the post office for delivery by mail. Respondent has its employees resupply news dealers and racks during the day after the carriers have made their early morning deliveries.

The length of the carriers' employment is in effect open-ended. The contract provides for a year-to-year term of employment absent either party terminating the contract under the stated terms. The carriers, for the most part, are engaged in the delivery of the Respondent's newspaper as their primary source of employment. The skill that is required to perform the carrier and hauler functions is not extraordinary. These workers are quickly trained in their routes and responsibilities. They must be able to drive common vehicles and only are required to possess a commercial driver's license. Their jobs do not call for uncommon expertise.

The carriers and haulers do not operate independent businesses and they devote virtually all of their time, labor, and equipment to providing the essential functions of the Respondent's newspaper business. The Respondent provides the contract and unilaterally changes its terms with ease. These workers receive some training by the Respondent and are instructed as to pickup order and delivery deadlines in their 7 day a week work. They have a nonexclusive right to delivery in their areas with little realistic entrepreneurial opportunity for gain or loss. The Respondent does the bookkeeping and instructs the carriers on the specifics of who gets a paper. Respondent has its own employees do similar delivery work. All of these factors weigh heavily in favor of employee status.

While the contracts signed by the carriers and haulers indicate they have an independent contractor relationship with the Respondent, the actual operation of the relationship, when measured by the standards cited in the Board's cases, demonstrates a different arrangement. *NLRB v. Amber Delivery Service, Inc.*, 651 F.2d 57, 63 fn. 7 (1st Cir. 1981) ("That each driver expressly disclaimed the status of employee in his contract with Amber although relevant as evidence of 'an assumption of control by the one and submission to control by the other,' *Restatement (Second) of Agency* s 220, comment m, at 492 (1957), is by no means dispositive.") I find that the Respondent's integration and control of the carrier and hauler work necessitates the conclusion that these workers are "employees" within the definition of Section 2(3) of the Act. *Corporate Express Delivery Systems*, 332 NLRB 1522 (2000); *Stamford Taxi, Inc.*, 332 NLRB 1372 (2000); *Slay Transportation Co.*, 331 NLRB 1292 (2000); *Roadway Package System*, 326 NLRB 842 (1998), *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 258 (1968).<sup>3</sup>

#### V. ALLEGED VIOLATIONS OF THE ACT

In approximately October 1999 the Respondent's carriers and haulers contacted the Union about becoming their collective-bargaining representative. The Union shortly thereafter did commence an organizing drive among these workers. The chief proponents of the Union's effort were carriers DeWayne Flint, Ivana Calhoun, Bonnie and Tony Landes, Regina and Ronnie Whitaker, and John Aldridge.

##### A. Dewayne Flint

##### 1. Respondent establishes a safety zone

In early October 1999 the Respondent opened a new printing facility in St. Joseph known as Mitchell Woods. It was common for carriers, including DeWayne Flint, to wait at this facility to receive their newspapers according to the Respondent's loading order.

Flint was a leader in the union organizing campaign. He talked to fellow carriers about joining the Union, passed out union buttons, bumper stickers and flyers. He solicited carriers' signatures on union authorization cards and displayed union insignia on his vehicle. Flint attended union meetings and urged other carriers to also attend. Flint also discussed the union with some of the Respondent's mail room and pressroom employees who worked at Mitchell Woods.

In late November 1999 the Respondent painted a yellow safety line on the floor of the Mitchell Woods plant. Carriers were instructed to stay outside of perimeter of the yellow line because of safety considerations. The borders of the line al-

lowed carriers to enter the plant to have access to the dock, their message boxes, a rest room, and candy and pop machines, but no other parts of Respondent's indoor facilities.

Carrier John Aldridge testified he was aware that carriers were not normally suppose to cross the yellow line. He acknowledged, however, that he was told to cross that line on Saturday nights to get his paper inserts and use Respondent's equipment to haul the inserts out to his vehicle.

On January 27, 2000, the Respondent sent a memo to carriers instructing them:

For your safety and due to concerns of our insurance carrier we ask that when at the Mitchell Woods production facility you confine yourselves to the designated area for carriers. Those areas are the dock (where you pull your vehicles in), and inside the building only as far as the yellow lines. There are soda machines and a bathroom for your use located inside the yellow lines. (G. C. Exh. 3).

The Government alleges that the Respondent's rule prohibiting carriers from crossing the yellow line was designed to discourage discussion of the union. As discussed in detail below, the Respondent relies upon Flint's violation of the safety line as a reason he was discharged. I find that the Respondent credibly demonstrated that the yellow line was established for safety considerations. The plant was shown to contain moving vehicles, large rolls of paper and working machinery. I find that the Respondent did not violate Section 8(a)(1) of the Act when it established the rule that carriers should not cross the yellow plant line.

##### 2. Flint's restricted rights to enter Respondent's premises and his contract termination

In late December 1999 Flint placed a flyer announcing a union meeting on bundle tops. The meeting notices were placed only on the top of the carriers' first bundle of newspapers and were not inserted inside of the newspapers for delivery to customers.

Carrier Doug Walker testified that Flint told him that he had placed the union announcement on the bundles. Walker relayed this information to Respondent's State Manager Chris Zey. There were calls from carriers to Respondent's management about the union flyer. Zey also reported what he knew about the situation to Kevin Smith. The Respondent took no immediate action against Flint.

On January 4, 2000, City Home Delivery Manager, Sheila Switzer, issued a memo to carriers reminding them that unauthorized materials should not be placed in or on the Respondent's newspapers. The memo noted that, "Violations of this kind could result in termination of the agreement between you and the News-Press." (GC Exh. 24.) Kevin Smith testified that in 1998, the Respondent terminated its contract with another carrier after it was determined that she had inserted unauthorized material in the newspapers she delivered to customers. The material dealt with a local school bond issue.

Flint had the habit of going into the plant to get a soda pop from machines. He testified that some nights he would sweep the dock area and that he also would be in the plant on occasion to place inserts in Sunday papers. This routine changed on ap-

<sup>3</sup> Compare, *Dial-A-Mattress Operating Corp.*, 326 NLRB 884 (1998) (operators ran independent businesses) and a series of newspaper cases that were apparently analyzed on the basis of the "right to control test": *Evening News*, 308 NLRB 563 (1992); *Long Beach Press-Telegram*, 305 NLRB 412 (1991); *Asheville Citizen-Times Publishing Co.*, 298 NLRB 949 (1990); *Thomson Newspaper*, 273 NLRB 350 (1984); *Fort Wayne Newspapers*, 263 NLRB 854 (1982), *The Oakland Press*, 249 NLRB 1081 (1981).

proximately January 30, 2000, when District Manager Larry Sexton, telephoned Flint and told him that he was not allowed to come on to the Respondent's premises until after 2 a.m. Sexton told Flint that if he ignored this order he would be escorted off the premises by the police. Following this instruction, Flint thereafter would wait in a parking lot next door until after 2 a.m. to load his papers.

On about January 30 the Respondent gave Flint notice that his route was being terminated. He finished working his route at the end of February. In early February 2000 Flint was waiting for his newspaper load time in a nearby parking lot. Sexton drove up next to Flint and asked if his route termination would materially hurt him. Flint told Sexton it would not as his wife paid the bills. Flint asked Sexton why his contract was being terminated. According to Flint, Sexton replied it was because he had "threatened" a pressman. Flint asked who he had supposedly threatened and Sexton would not tell him. The Respondent offered no evidence that Flint had ever threatened a pressman. On cross-examination Flint was presented with his affidavit he gave to the Board during the investigation of the case. The affidavit made no mention of Sexton stating that Flint was being fired for having threatened a pressman. Although Sexton testified at the hearing he was not questioned about the parking lot conversation with Flint nor did he deny telling Flint that the reason he was terminated was because of threatening a pressman. Based on Flint's demeanor and his uncontroverted testimony of what Sexton said to him on this occasion, I credit Flint's testimony that Sexton told him the alleged threat led to his discharge.

Sexton testified that there were two reasons Flint's carrier contract was terminated. First, there was a safety issue of Flint crossing the yellow line in the plant and going in the press area. Sexton testified he was "aware of the problem with (Flint) going in around the press." Sexton recalled seeing Flint in the press area talking to Respondent's employees several times. He testified at first that he could not recall when this occurred, but later testified that he thought it was in November and December. Sexton was concerned that there was a danger factor of Flint or an employee being injured because of the machinery, equipment and large paper rolls that were in the plant restricted area. There was no testimony that Sexton or any other supervisor told Flint personally to leave the area or warned him against being in the area.

Sexton testified about the second reason for Flint's termination:

Another issue was placing unauthorized materials on . . . the bundles. We had other carriers complaining. . . . on the parking lot complaining that they didn't understand what he was talking about. You know, "what's going on? Why's he coming to our car talking to us?" And there was an arousal going on with other carriers not understanding what was happening. The main issue was safety.

(Tr. 860.)

Sexton acknowledged that some of the carriers told him that Flint was talking to them about the Union and this caused "more confusion than anything in what he was trying to get his point across with." Sexton testified that because of Flint's talk-

ing to the carriers, "My concern was, my God, I'm going to lose a carrier. . . ." Sexton testified that he, Smith and Switzer met to discuss Flint shortly before they mutually decided to terminate his contract. He recalled that Smith reported Flint was putting unauthorized materials on the bundles. Sexton stated his personal "big concern being new (in the job) and not having carriers, I was worried I was going to lose carriers because they were getting all stirred up, not understanding what . . . was going on. Going from car to car." (Tr. 862)

The General Counsel has the initial burden of establishing that union or other protected activity was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3). The elements commonly required to support such a showing of discriminatory motivation are union activity, employer knowledge, timing, and employer animus. Once such unlawful motivation is shown, the burden of persuasion shifts to the Respondent to prove its affirmative defense that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982); *approved in NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Electromedics, Inc.*, 299 NLRB 928, 937 (1990), *enfd.*, 947 F.2d 953 (10th Cir. 1991); *Presbyterian/St. Luke's Medical Center*, 723 F.2d 1468, 1478-1479 (10th Cir. 1983). The test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 *fn.* 2 (1984). "A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enfd.* sub nom. 705 F.2d 799 (6th Cir. 1982).

Flint's union activities were well known through his display of union insignia and talking to other carriers about the Union. The Respondent admitted hearing complaints of his union activities from other carriers and suspected him of putting union announcements on bundle tops. The timing of his contract termination was linked to these union activities. As discussed in more detail below the record as a whole demonstrates the Respondent showed animus for the carriers' union activities. Thus, I find that the Government established the prerequisites to support its assertion that Flint was discharged, at least in part, because of his union and protected concerted activities.

The Respondent argues that Flint was discharged because he intruded into the plant-prohibited area and because he placed the union bulletin on bundle tops. As to the safety concerns they became paramount after Flint started engaging in union activity. Sexton testified to observing Flint in the dangerous plant areas on several occasions in November and December talking to Respondent's employees. Yet Sexton took no action at that time to restrict or warn Flint of such conduct. Carrier John Aldridge testified he regularly crossed the line to get inserts for papers. There is no evidence he was ever warned or punished for such conduct. The Respondent did become concerned enough, however, after Flint's union activities became known, to issue a general "yellow line" reminder memo on

January 27. There is no evidence that Flint ignored that memo and crossed into the prohibited yellow line area thereafter.

With regard to the union notices on the bundles the Respondent showed it was concerned about this type of activity. It had discharged another carrier for conduct of putting notices in the newspapers delivered to customers. While Flint's actions did not go that far, the Respondent proved it was concerned about such activity and prohibits this conduct in its carrier contracts. The testimony of Sexton, however, shows that the discharge involved more than placing the union notices on the bundles. Sexton based the discharge, in part, on the fact that Flint was upsetting carriers with his union talk. This is a significant admission that Flint's union activities played a role in his discharge.

Sexton's testimony shows that the Respondent advanced an additional reason for the discharge—that Flint had “threatened” a pressman. No evidence was produced that this ever happened and Sexton refused to give any details to Flint when questioned about the matter. The Respondent's brief does not assert that this was a reason for the discharge. Offering shifting defenses for a discharge is evidence of an unlawful motive. *Airport Distributors*, 280 NLRB 1144 fn. 2 (1986).

I conclude that the Respondent has failed to carry its burden of showing that Flint would have been discharged regardless of his union activities. I find that the Respondent's actions in notifying Flint of the termination of his contract on January 31 and its termination 30 days later are violations of Section 8(a)(1) and (3) of the Act. *Wright Line*, 251 NLRB 1083 (1980).

I further find that the Respondent's January 30 prohibition against Flint being on the premises before his scheduled load time was designed to prevent him from engaging in union and concerted activity. Sexton's testimony shows that the Respondent was greatly concerned about Flint getting the carriers “all stirred up” with his union talk. I find this prohibition is a violation of Section 8(a)(1) of the Act. I also find that when the Respondent relied upon Flint's breach of the yellow safety line as one of its reasons for his discharge, the Respondent was disparately enforcing that rule. I find the disparate enforcement of that rule against Flint is a violation of Section 8(a)(1) of the Act.

### 3. March—Flint's removal from the premises

Flint returned to the Respondent's premises in the first part of March 2000 after his route was terminated. He testified that he was there to work as a substitute carrier for Tony Landes. He also had some money to turn over to Sexton. He spoke to Respondent's employee Scott Kirschner and Supervisor Larry Sexton about the money matter and then Sexton asked him to leave the premises. Flint did not say that he was there to deliver Landes' route. Flint refused to leave the Respondent's premises without instructions to do so from the police. He told Kirschner, “This is a polite way to say, fuck you.” The police were summoned and Flint was escorted from the premises.

The Government alleges this incident is a separate violation of Section 8(a)(1) and (3) of the Act. Flint was not an employee of the Respondent at the time, and did not inform the Respondent he was allegedly present to work as a substitute. I find that the Respondent committed no unfair labor practice by having

him removed from the premises upon his refusal to leave. I find that the Respondent's actions on this occasion did not violate Section 8(a)(1) and (3) of the Act.

### B. Interrogation of Joan Flint

Joan Flint is DeWayne Flint's sister-in-law. Her husband, Charles Flint, is a carrier for the Respondent. Joan Flint is not employed by the Respondent but rather works on the Lieutenant Joe Riverboat Casino at St. Joseph, Missouri. David Guck, one of Respondent's admitted supervisors, also worked as a supervisor on the Lieutenant Joe Riverboat Casino. His duties included supervising Joan Flint.

Joan testified that in late 1999 or early 2000 she was working at the casino when Guck engaged her in conversation. He asked her whether her brother-in-law was pro-Union. Joan said, “Yes.” Guck then asked her whether her husband was pro-Union or not. She replied, “that is up to him.”

The Respondent defends against the allegation that Guck's questioning of Joan Flint violated the Act by pointing out that she had a good working relationship with Guck. The Respondent further argues that Guck did not threaten Joan Flint, and, according to testimony, Guck was just interested in what was going on.

I find that given Guck's supervisory status over Joan Flint, as well as his supervisory position with the Respondent, that his interrogation of Joan regarding the union sympathies of her husband and brother-in-law was coercive. I find that the Respondent violated Section 8(a)(1) of the Act by this interrogation.

### C. Regina Whitaker

In May and June 1999 Respondent awarded carrier Regina Whitaker routes 2427 and 2409. She and her husband, Ronnie, subsequently engaged in union activity including attending union meetings and soliciting carriers to sign union authorization cards. In December 1999 Regina told her District Manager, Timothy Keller, that she and Ronnie had attended union meetings. Ronnie also had occasion to tell Keller that the couple supported the Union.

In January 2000 Keller told the Whitakers that the Respondent thought Regina was giving poor service and losing too many subscribers on Route 2409. Keller said that the Respondent was considering canceling her contract on that route. Regina said that she was losing subscribers because they were not paying their bills, some had passed away, and some had moved. Regina told Keller that the real reason why the Respondent wanted to take the route away was because of the Union. Keller denied that was the case. According to the Whitakers, Keller said that David Bradley (the Respondent's owner) had all the money, the best lawyers and he would shut the News-Press down if the Union went through. Respondent notified Regina by letter dated February 1, 2000, that her contract for route 2409 was being canceled.

Keller denied that Regina Whitaker told him that she believed the reason the Respondent was considering terminating her route 2409 contract was that she supported the Union. He did admit that she mentioned that she thought Supervisor Chris Zey was taking action against her because of her union activity.

Keller denied telling the Whitakers that the Respondent would shut the business down rather than allow the Union to represent the employees.

Considering the relative demeanor of the Whitakers and Keller I credit the Whitaker's version of what Keller said to them about the Respondent's intention to shut the business rather than permit the Union to represent the employees. The test of whether an employer's remarks or actions violated Section 8(a)(1)'s prohibition against interference, restraint, or coercion is not whether it succeeds or fails, but, rather, the objective standard of whether it tends to interfere with the free exercise of employee rights under the Act. *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 490 (1995). I find that Keller's statement to the Whitakers did tend to coerce and interfere with their union activities and is a violation of Section 8(a)(1) of the Act.

Keller testified that he made the decision to terminate Regina's route 2409 and that his decision was based upon a drop in circulation. He had investigated the matter and discovered that circulation was being diminished due to subscribers not paying their bills, subscribers dying, and subscribers moving away. Keller stated that his investigation also revealed that the only other reason why there was a drop in circulation was due to poor service. He could not be specific as to details of any alleged poor service. Keller also testified that he did not rely on the alleged poor service as a factor in determining to terminate Regina's route. Keller helped Regina with various promotions to increase the circulation but it still did not improve to a level he considered satisfactory.

The Respondent blames Regina Whitaker for the loss of circulation on route 2409 yet was unable to tie the loss to factors within her control. Keller could not substantiate any claim that her poor service was in fact a cause of the diminished circulation and he did not rely on this factor in terminating her route. It is unclear how Whitaker was at fault in the situation. The Respondent conceded that she was an excellent carrier. The cancellation of her route 2409 contract came during the heat of the union activity at Respondent's business. The Respondent knew of her union activity. The credited evidence shows that contemporaneous with the route cancellation, Keller threatened the Whitakers that the Respondent's owner would shut down the business before allowing the Union to represent the carriers. I find that the Government has proven that the cancellation of the contract was, in part, due to Regina Whitaker's union activities. The Respondent's defense lacks credibility. Regina Whitaker was an excellent carrier who had little or no control over the causes for the drop in circulation on the route. Keller's combined efforts with her to improve the situation were not satisfactory. On balance I find that the Respondent would not have terminated Regina Whitaker's route 2409 absent her union activities. I find that the Respondent violated Section 8(a)(1) and (3) of the Act when it notified and ultimately canceled Regina's contract on route 2409.

#### *D. Tony Landes*

Husband and wife Tony and Bonnie Landes had served as carriers for the Respondent for several years. Both Bonnie and Tony were active union supporters who openly displayed their support for the Union by wearing union pins and displaying a

union bumper sticker on Tony's truck. They talked to other carriers about the Union and passed out authorization cards. The record demonstrates that the Respondent was aware of their union support.

In late 1999 and early 2000, Tony had a Sunday bundle haul into Maryville, Missouri, and a rural home delivery route. At the end of January his Sunday bundle haul into Maryville was terminated. The Landes learned of the contract termination when Chris Zey called Bonnie. He told her that the Respondent would no longer allow her cousin, Lyle Moore, to come to the dock to load papers. When asked why, Zey replied that it was because he had been badmouthing the Respondent. Zey also informed Bonnie that the Respondent would be terminating Tony's bundle haul route. She asked why and he told her it was because Tony was not stacking newspapers as he was supposed to in a certain area. Bonnie protested that she knew the night he was talking about, that she had been there and the papers were stacked properly. Zey again told her that Tony's contract was being terminated.

Zey testified that Tony's route was terminated "without cause" and that the Respondent simply preferred to have someone else run the route. Zey testified that complaints from other carriers were not the reason Tony's route was terminated.

On about February 7, District Manager Tena Herring had a conversation with Tony and Bonnie. According to the Landes' testimony, Herring said that Tony's name was being mentioned at the Respondent's office quite often in connection with union activity. Herring told Tony that he needed to keep his mouth quiet and watch what he said in the dock area. Herring told Tony that he needed to keep his mouth shut about union activities because he had already lost his bundle contract going into Maryville, Missouri, and she did not want him to lose anything else.

Tena Herring, who at the time of her testimony no longer worked for the Respondent, denied that she had a conversation with Tony or Bonnie Landes in which she stated words to the effect that Tony Landes' name was being mentioned quite often, that Tony was discussing union activities, that he had better keep his mouth shut and watch what he says, or that his Sunday only Maryville bundle hauling contract was terminated because of his union activity. Considering the demeanor of the Tony and Bonnie Landes in contrast to that of Tena Herring, I credit the Landes' version of their conversation with her. I find that Herring's comments to the Landes about Tony's union activities interfered with, restrained and coerced them in violation of Section 8(a)(1) of the Act.

With regard to the notification and termination of Tony's bundle haul route the record shows that he was a visible union supporter, his union activities were known to the Respondent and the route termination occurred at the time of these activities. I find that the Government has established its initial burden of showing the route termination was associated with Tony Landes union activities. Zey testified with cloudy candor that the termination was "without cause" and that it had nothing to do with complaints from carriers. Herring gave context to the contract termination when she warned Tony to keep his mouth shut about the Union. I find that the Respondent has failed to carry its burden of showing that it would have terminated Tony

Landes Maryville, Missouri, hauler route regardless of his union activities. I find that the Respondent violated Section 8(a)(1) and (3) of the Act by this cancellation action.

*E. Bonnie Landes*

On approximately February 14 Bonnie Landes learned that a bundle haul route would soon become available. She telephoned Herring, her district manager, and asked to take over the route. Herring came to the Landes' household the following day to discuss the details of the route with Bonnie and Tony. According to the Landes' testimony Herring concluded the meeting by saying the Landes could have the route and she would return the next day with a contract. I specifically credit the Landes versions of what Herring told them on this occasion. The following morning Herring returned and told the Landes that she had some bad news in that her supervisor, Regional Manager Chris Zey had informed her that the Landes could not have two bundle hauls in the same household. Bonnie pointed out that they already had two bundle hauls in that her husband had a Sunday haul.

The Respondent recites the history of the situation by noting that in the spring of 2000, Bonnie Landes had contracted to haul route 2260. This route was the Respondent's largest bundle hauling route containing some 5,500 newspapers. Bonnie already delivered a home delivery route consisting of 1000 papers. The Respondent's total circulation is approximately 40,000 papers; thus Bonnie had control of over 10 percent of the Respondent's total circulation. Herring testified that she and Chris Zey were concerned that if the additional haul route was given to the Landes the newspapers would not be delivered by Landes by 6:00 a.m., if they had to share a vehicle after the other broke down and they could not find a replacement vehicle. The Respondent asserts that this is the sole reason that the Landes were denied the opportunity to contract for route 2267, the second largest bundle haul consisting of 2,400 papers.

I find that the Government has shown that the haul that Bonnie Landes wanted was denied her because of her and her husband's union activities. Herring told the Landes that the route was theirs but then the decision was reversed. This occurred shortly after the Respondent unlawfully took Tony's Sunday haul route away from him and warned him about the repercussions that would result from his union activities—the same union activities in which Bonnie was also engaged. I find that the Respondent did not meet its burden of showing it would not have awarded the route to Bonnie Landes regardless of her union activities. I find that the Respondent violated Section 8(a)(1) and (3) of the Act by the denial to her of that route.

*F. John Aldridge*

John Aldridge was contracted as a carrier on a city walk route and a bundle-hauling route. His bundle hauler route was terminated by the Respondent and the Government alleges this action was unlawfully motivated by his union activities.

Aldridge was a union supporter who attended union meetings, signed a union authorization card, and talked about the Union with other carriers. Aldridge started wearing a union button in October 1999 that bore the message "vote Team-

sters." Some of Respondent's supervisors observed Aldridge wearing the union button.

On March 27, 2000, Aldridge was called to a meeting with city home delivery manager, Sheila Switzer, in the Respondent's conference room. Switzer stated that Sexton had observed him talking to Flint in the parking lot for 20 minutes after he had loaded his papers. Aldridge denied talking to Flint that long but did acknowledge having short conversations with him. Switzer said that District Manager Kevin Williams had seen Aldridge's vehicle parked at a doughnut shop when it was still loaded with carrier's bundles. Aldridge denied making such a stop when his truck still had carriers' bundles.

Switzer then complained that Guck had reported that Aldridge had telephoned him several times to haul a load. Aldridge said that this was exaggerated, but conceded he had called upon Guck a couple of times for assistance. Aldridge admitted that he had some problems with his truck in February and March. He testified that when his vehicle would not run he usually had a vehicle in reserve that he could use. Aldridge testified that Switzer asked him how he knew Flint. Aldridge explained that Flint was his wife's cousin. Switzer then told Aldridge that the Respondent would be mailing him his 30-day termination notice for his load hauler route on April 1. Aldridge was duly notified of the termination of that route but was retained on his carrier route. Aldridge did not want to deliver the carrier route in the absence of his hauler contract. He therefore terminated his home-delivery carrier route.

Switzer testified that the reason she decided to terminate Aldridge's hauler contract was his lack of reliable transportation. She noted that on one occasion the Respondent had to use its own van to deliver his bundle haul, and on about five other occasions in March, David Guck had to help Aldridge. Switzer told Aldridge that if he could show her that he could perform his haul through his own means every night during the 30-day notice period, she would continue his contract. Switzer testified that Aldridge ultimately abandoned his two routes before the 30-day period ended and he was not retained. She instructed David Guck to charge Aldridge for any substitution fees the Respondent incurred. Aldridge acknowledged that his bond money was charged because the Respondent had to hire a replacement for him before the end of his 30-day termination period.

I find that the Respondent had knowledge of Aldridge's union activities, the timing of his hauler contract was contemporaneous with those union activities, and the Respondent's animus towards the union is reflected on the record. Thus the standard elements forming the basis for an initial showing that Aldridge's hauler contract termination was linked to his union activities have been proven. Switzer credibly testified that on occasion Aldridge had vehicle problems that prevented him from fulfilling his hauler obligations. She also credibly testified that Aldridge never took her up on her offer to continue his contract if he supported the request with evidence he possessed reliable transportation for the hauler route. The record shows Aldridge abandoned his routes before the termination period was completed and his bond was charged as a result. Kevin Smith credibly testified that the Respondent had previously terminated carriers that did not have reliable transportation. I

find on balance that the Respondent has proven that it would have terminated Aldridge's hauler route regardless of his union activities and that the action was not a pretext. I find that the Respondent did not violate Section 8(a)(1) and (3) by terminating his hauler contract. *Wright Line*, 251 NLRB 1083 (1980).

The Government's brief asserts that the Respondent violated Section 8(a)(1) of the Act in late March or early April, 2000, when Guck informed Aldridge that the union would not get in before they got rid of a union supporter. The Government's brief cites no evidence in support of this allegation. I find that paragraph 5(h) of the amended complaint is without merit and that the Respondent did not violate Section 8(a)(1) of the Act as alleged in that paragraph.

#### G. Ivana Calhoun

Employee Ivana Calhoun had worked for the Respondent since October 1999 stocking newspaper racks and stores that sell Respondent's newspaper. She was paid a price per piece rate for delivering the newspapers. Calhoun was an active union supporter who distributed union flyers, invited carriers to union meetings, and solicited carriers to sign union authorization cards. She openly wore a union button and displayed "Vote Teamsters" bumper stickers on her work vehicle.

##### 1. Kirschner's conversation with Calhoun

Calhoun was loading her newspapers on January 31, 2000, when employee Scott Kirschner engaged her in conversation. Calhoun testified that Kirschner told her that Circulation Manager Kevin Smith told him to tell Calhoun that Smith was tired of hearing her name come up in conjunction with "this union business." Kirschner said Smith had told him that anytime DeWayne Flint's name was brought up, her name was also brought up. Kirschner told Calhoun that Smith said that Calhoun was a good worker and had always done well by them, but Smith was tired of hearing her name brought up in conjunction with the union business and that she had better cease or else. Kirschner said that Smith had asked him to talk with Calhoun because he knew that Kirschner and Calhoun were friends. Kirschner said that he did not want to get involved. Calhoun assured Kirschner that she did not consider him involved, that Kevin Smith had involved him by putting him in the middle. Calhoun testified that after this conversation she removed the union sticker from her vehicle and temporarily refrained from overtly engaging in union activity.

Smith denied ever sending Kirschner to Calhoun to discuss the Union, her union activities or threaten her regarding such activities. Employee Kirschner was not called to testify by either party. He was Calhoun's friend, an employee of the Respondent and allegedly acting on behalf of the Respondent. I find that the record does not support a conclusion that Kirschner was favorable to any party in this proceeding. Presumably he was equally available to all parties to call as a witness, and no adverse inference is attributed to any litigant because of his nonappearance. *Queen of the Valley Hospital*, 316 NLRB 721 fn. 1 (1995); *Salisbury Hotel*, 283 NLRB 685, 691 fn. 10 (1987). I credit Calhoun's uncontroverted testimony as to what Kirschner said to her, allegedly at Smith's behest.

The Government bears the burden of proving that Kirschner was acting as the Respondent's agent when he spoke to Calhoun. In determining if a person is acting as the agent for another, the Board follows the common law principles as expressed in the Restatement 2d of Agency. As the Board stated in *Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82, 83 (1988): "either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or the principal should realize that this conduct [the manifestation] is likely to create such belief." See also, *Southern Bag Corp., Ltd.*, 315 NLRB 725 (1994); *Allegany Aggregates, Inc.*, 311 NLRB 1165, 1166 (1993). Smith denied giving Kirschner any instructions to talk to Calhoun about the Union. Kirschner was not called as a witness to confirm or deny such instructions. The Government did not show that Smith was aware of Kirschner's statements to Calhoun. I find, therefore, that the Government has failed to prove that when Kirschner spoke to Calhoun he did so with real or apparent authority on behalf of the Respondent. I find that Kirschner's statements to Calhoun were not a violation of Section 8(a)(1) of the Act.

##### 2. Changes to Calhoun's work

Since October 1999 Calhoun collected coins from newsracks 1 day a week, Calhoun was contracted to deliver newspapers to newsracks and dealers on route 5203. In late July, supervisor Dave Mapel discussed with Calhoun the Respondent's intentions to make changes to the rack and dealer delivery routes. The Respondent wanted to increase the number of outlets in town that carried the newspaper. The changes included adding one or two drivers, dividing routes and changing the pay scale. Calhoun asked about a pay raise for her work. Mapel told her the budget would be coming up and he would look into it. Mapel also said employee Lee Taylor had moved on and the Respondent would need someone to do the computer work and someone else to become the rack maintenance supervisor. Mapel told Calhoun he had her in mind for the rack maintenance supervisor job since she knew how to repair the racks and keep them functional. Mapel told her this would be a full time job. Calhoun asked if she could keep her paper route because she enjoyed doing that work. Mapel said that she would not be allowed to do that. Mapel said that an advertisement for the job would appear in the newspaper the following Sunday, and she should let him know if she was interested. Calhoun did not apply for the job.

Starting in August Calhoun resumed her union activities, including attending union meetings. On August 30, 2000, Mapel and Calhoun met for lunch. They were joined by Respondent's employee Allen Sivertson. Mapel gave Calhoun written notice that her Monday dealer-return collection contract was being terminated. Calhoun asked why the Respondent was terminating this contract with her. Mapel said Sivertson would be performing that work and employee Michelle Waller would also help. Calhoun testified she objected to the change because it would diminish her income by \$200 a month. Mapel and Sivertson recalled Calhoun stating she was glad to receive the contract termination notice, because she wanted to sleep in on Mondays. Mapel testified that the Respondent had reassigned Ivana Calhoun's and Bill Davis Monday dealer collection con-

tracts because it saved the company money. The work was assigned to Respondent's employees after he had made calculations concerning the cost savings and noting that the employees had the time to do additional duties.

Mapel offered Calhoun a contract for the work she had been doing on coin collection work. The offer was for \$175 a month and Calhoun signed the new coin collection contract that day.

Calhoun was a signatory to a contract to deliver newspapers to newsracks and retail outlets. On approximately September 28, 2000, the Respondent sent Calhoun a written 30-day notice that her carrier contract was being terminated. The Respondent notified her such routes were being reorganized and gave her paperwork on which she could formulate a bid for the routes. Mapel implemented the bidding process because he had used the same procedure in his recent former job in Nebraska. Mapel testified that he wanted to realign and reduce the size of the single copy delivery routes including Calhoun's route. Mapel determined that a new fourth route should then be added to this work. The purpose of this change was to increase sales by having the four new rack routes serviced earlier in the day and thereby making papers available to customers at an earlier opportunity.

Calhoun submitted bids on three routes: 5201, 5202, 5203. Her bid for route 5202 was for a per piece rate of \$.04192. Mapel and Calhoun negotiated about the matter and eventually they agreed upon a rate higher than her original offer. Calhoun contracted to do the work on route 5202 at a rate of \$.0485 per piece. Calhoun conceded that at the time she signed her single copy delivery contract she viewed the per piece rate as an improvement over the flat rate.

In December 1999 the Respondent lowered in equal proportions the draw for each of the single copy delivery routes, including Calhoun's. Mapel testified that the draw was diminished because (1) single copy sales were down due to customers' favorable reaction to a home delivery marketing effort; and (2.) extreme cold and snowy weather that typically diminished sales from racks.

### 3. Analysis of the changes to Calhoun's work

The Government alleges that the Respondent violated the Act by changing Calhoun's routes, giving her a smaller route, taking away her Monday collection duties and limiting her newspaper draws. The cumulative result of these actions was that Calhoun earned less money. The Respondent denies it unlawfully effected Calhoun's work and points to the above-noted business reasons for making the changes. On balance I find that the Government has failed to establish a prima facie case that the changes made to Calhoun's work situation were the result of her union activities. I found Mapel to be a credible witness and I credit his testimony as to the reasons for the changes involving Ivana Calhoun's work. The Respondent presented plausible business justification for each of the changes and showed that it would have made such revisions absent Calhoun's union activities. I find that the Respondent did not violate Section 8(a)(1) and (3) of the Act by its conduct in modifying Calhoun's work situation.

### CONCLUSIONS OF LAW

1. The St. Joseph News-Press, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Teamsters Union Local 460 is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has violated Section 8(a)(1) and (3) of the Act.

4. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent has not violated the Act except as herein specified.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended<sup>4</sup>

### ORDER

The Respondent, St. Joseph News-Press, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, taking away work or refusing to assign work to DeWayne Flint, Tony Landes, Bonnie Landes and Regina Whitaker, or any other employee, because they engage in union or other protected concerted activity.

(b) Threatening employees with the closing the business or other adverse consequences if the Union is selected to represent them or they engage in union or other protected concerted activity.

(c) Interrogating employees about their union activities and sympathies.

(d) Disparately prohibiting employees from entering the Respondent's premises or crossing the plant's yellow safety line because they have engaged in union or other protected concerted activities.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of this Order, offer DeWayne Flint, Tony Landes, Bonnie Landes and Regina Whitaker full reinstatement to his their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed

(b) Make DeWayne Flint, Tony Landes, Bonnie Landes and Regina Whitaker whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, computed on a quarterly basis, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

<sup>4</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge or the taking away of work from DeWayne Flint, Tony Landes, Bonnie Landes and Regina Whitaker, and within 3 days thereafter notify these employees in writing that this has been done and that the discharge and taking away of work will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in St. Joseph, Missouri, copies of the attached notice marked "Appendix."<sup>5</sup> Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 1, 1999, *Excel Container, Inc.*, 325 NLRB 17 (1997).

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, September 6, 2001, San Francisco, California.

#### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

<sup>5</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize  
To form, join, or assist any union  
To bargain collectively through representatives of their own choice  
To act together for other mutual aid or protection  
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge, take away work or refuse to assign work to DeWayne Flint, Tony Landes, Bonnie Landes and Regina Whitaker, or any other employee, because they engage in union activity on behalf of Teamsters Union Local 460, any other labor organization or engage in other protected concerted activity.

WE WILL NOT threaten employees with the closing of our business or other adverse consequences if the Union is selected to represent them or they engage in union or other protected concerted activity.

WE WILL NOT interrogate employees about their union activities and sympathies.

WE WILL NOT disparately prohibit employees from entering the Respondent's premises or crossing the plant's yellow safety line because they have engaged in union or other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL within 14 days from the date of this Order, offer DeWayne Flint, Tony Landes, Bonnie Landes and Regina Whitaker full reinstatement to his their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed

WE WILL make DeWayne Flint, Tony Landes, Bonnie Landes and Regina Whitaker whole for any loss of earnings and other benefits suffered as a result of our discrimination against them.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge or the taking away of work from DeWayne Flint, Tony Landes, Bonnie Landes and Regina Whitaker, and WE WILL, within 3 days thereafter notify these employees in writing that this has been done and that the discharge and taking away of work will not be used against them in any way.

ST. JOSEPH NEWS-PRESS